Supreme Court, U.S.
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No. 99-99 928

In The
Supreme Court of the United States

COSMAIR, INC.

Petitioner,

vs.

REVENUE DIVISION OF THE DEPARTMENT OF TREASURY OF THE STATE OF MICHIGAN,

Respondent.

On Petition For A Writ Of Certiorari To The Court of Appeals of Michigan

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court recently reiterated the long-established test for unconstitutional administrative discrimination in the administration of a state's tax laws in *Allegheny-Pittsburgh Coal Co v. Webster County*, 488 U.S. 336, 345 (1988),

> '[I]ntentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property.' *Sunday Lake Iron Co., v. Township of Wakefield*, 247 U.S. 350, 352-53 (1918); *Sioux City Bridge Co v. Dakota County*, 260 U.S. 441, 445-46 (1923); *Cumberland Coal Co v. Board of Revision of Tax Assessments in Green County, PA*, 284 U.S. 23, 28-29 (1931).
>
> * * *
>
> 'The equal protection clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.' *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946).

The final decision of the Michigan Court of Appeals, however, refused to apply this test, instead affirming unauthorized intentional and systematic administrative discrimination by the Michigan Department of Treasury in enforcing a Michigan tax by applying a rational basis test to the unauthorized administrative classification. The question presented is:

1. Was the Court of Appeals correct in substituting a "rational basis" test for the long-standing "intentional and systematic" test applied to unauthorized administrative discrimination as recently reiterated by this Court in *Allegheny-Pittsburgh Coal Co. v. Webster County*, 488 U.S. 336, 345 (1988)?

Should this Court determine that a rational basis review is appropriate to test the Federal Equal Protection constitutionality of unauthorized and prohibited administrative action in enforcing a state's tax statute, the second question presented is:

2. Where the statute empowering the tax commissioner to administer a state tax clearly establishes the legislative policy and purpose, could the Court of Appeals theorize a rational basis which conflicts with such stated purpose to justify unauthorized intentional systematic administrative discrimination?

The third question presented by this petition looks to the application of the rational basis test analysis, which the Michigan Court of Appeals concluded was applicable to the statutorily unauthorized and prohibited intentional and systematic administrative discrimination. The Michigan Court of Appeals refused to consider whether the alleged rational bases for the administrative discrimination could reasonably be conceived to be true or whether they lacked any reasonable support in fact, or whether there was at least some plausible connection between the discrimination and the purpose of the law. The third question presented is:

3. If a rational basis could have been theorized to justify intentional systematic administrative discrimination, did the Court of Appeals err in relying on purported rational bases which lacked any reasonable support in fact and could not have reasonably been conceived to be true by the tax commissioner as providing a rational basis for the prohibited administrative classification?

Lastly, the Michigan Court of Appeals' attempt to find Petitioner not similarly situated with the favored 3,000 other potential taxpayers "caught" by the Department under the new Due Process/Commerce Clause SBT Act jurisdictional test, ignored the Michigan Revenue Act which treats all persons owing taxes not yet paid as a single and assessable class, and permitted the tax

administrator to legislate tax classes not approved by the legislature. The fourth question presented is:

4. Where state legislation has established a single class, can a state tax administrator, acting without statutory authority and contrary to a legislative prohibition, administratively establish sub-classes to be given disparate treatment?

LIST OF PARTIES

The parties are as stated in the caption. In the courts below, the petitioner was referred to as the plaintiff, appellant, or Cosmair. The respondent was referred to as the defendant, appellee, or the Department of Treasury.

RULE 29.6 STATEMENT

Petitioner, Cosmair, Inc., is the Parent Corporation. No publicly held company owns 10% or more of Cosmair's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Cosmair, Inc. respectfully petitions for a writ of certiorari to review the final judgment and opinion of the Michigan Court of Appeals in this case.

OPINIONS BELOW

The Opinion of the Michigan Court of Appeals (App. 1a-4a), the Michigan Supreme Court's order denying Cosmair's application for leave to appeal (App. 6a), and the Michigan Supreme Court's order denying Cosmair's timely filed motion for reconsideration (App. 7a), are not officially reported.

JURISDICTION

The Opinion of the Michigan Court of Appeals was entered on March 20, 1998. App. 1a-4a. The Michigan Supreme Court denied Cosmair's application for leave to appeal on April 28, 1999. App. 6a.. The Michigan Supreme Court denied Cosmair's timely filed motion for reconsideration on August 31, 1999. App. 7a. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1, provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Relevant portions of Michigan Constitution and statutes are set forth at App. 37a-55a.

STATEMENT OF THE CASE

1. Introduction

For more than 13 years, the State of Michigan, as a matter of administrative policy, uniformly applied Public Law 86-272,

codified as 15 U.S.C. § 381, as the administratively adopted jurisdictional test under the Michigan Single Business Tax Act, MICH. COMP. LAWS. § 208.1 *et seq.* ("SBTA").[1] During the tax years at issue, 1984 though 1988, Cosmair relied upon the Department of Treasury's (the "Department") published Bulletins 1980-1 and RAB 89-46, to organize and conduct its business activities in Michigan so as to avoid liability under the SBTA.[2]

Cosmair, a Delaware corporation with its commercial domicile and place of business in Clark, New Jersey, manufactured and distributed cosmetics and fragrances throughout the United States. In reliance upon the Department's published bulletins declaring PL 86-272 as the jurisdictional test under the SBTA, Cosmair closed its only Michigan facility in 1983, and consistently thereafter asserted that it was not subject to Michigan's single business tax ("SBT") jurisdiction under that PL 86-272 test. In 1989 and 1991, the Department informed Cosmair that it did not believe Cosmair's activities in Michigan, during tax years 1984-1988, were protected by PL 86-272. App. 57a. Cosmair refused to concede jurisdiction. The Department conducted an audit. The auditor recommended that the Department assert jurisdiction under PL 86-272. The Department, on October 8, 1991, issued its intent to assess. App. 59a. Cosmair protested and requested an informal conference. App. 59a-60a. Before the informal conference was held, and before the Department's assessment was finalized, the Court of Appeals issued its *sua sponte* decision in *Gillette Co. v. Dep't of Treasury,* 198 Mich. App. 303, 497 N.W.2d 595 (1993), *lv den* 445 Mich. 860 (1994), *cert den* 130 L.Ed.2d 673 (1995) ("*Gillette* decision"), refusing to apply the long-standing PL 86-272 jurisdictional test, and applying instead the Federal due

[1] PL 86-272 prohibits a state from imposing a net income tax on the income derived from interstate commerce if the person's only business activities within the state are the solicitation of orders for sales of tangible personal property sent outside the state for approval or rejection and filled by shipment or delivery from a point outside the state.

[2] The Department issued Single Business Tax Bulletin 1980-1 (May, 1980), entitled *Single Business Tax Jurisdictional Standard* (App. 71a), and Revenue Administrative Bulletin 1989-46 (approved: May 31, 1989), entitled *Single Business Tax Jurisdictional Standard* ("RAB 89-46") (App. 76a), to notify persons engaged in business that it had administratively adopted PL 86-272 as the jurisdictional standard for determining taxability under the SBTA.

process/commerce clause ("DP/CC") jurisdictional tests enunciated by the U.S. Supreme Court in *Quill Corp v. North Dakota*, 504 U.S. 298 (1992). App. 60a. This decision came without warning. The applicability of PL 86-272 had not been discussed, briefed, or argued. App. 59a.

It had been established for many years that the SBT was not a tax imposed on or measured by net income, and therefore, PL 86-272 by its literal terms, would not apply.[3] The Michigan appellate courts had also recognized this fact.[4] The Department had knowingly administratively adopted and uniformly applied PL 86-272 as the jurisdictional standard for more than 13 years.[5] (See *Gillette*, 198 Mich. App. at 307-308.)

Gillette established a new SBTA jurisdictional test much easier to meet than the PL 86-272 test. Under the DP/CC tests, a multi-state business with a Michigan resident employee would be subject to Michigan's SBT jurisdiction. App. 61a. The *Gillette* decision gave the new DP/CC tests full retroactivity to 1976.

After the *Gillette* opinion, the Department conducted a computer sweep to locate and identify potential SBT taxpayers who had filed Michigan employee income tax withholding returns, but not SBT returns. App. 61a-62a. It winnowed the search to nearly 2,790 potential taxpayers to whom in November 1993 (eight months after the *Gillette* decision was issued), it began sending a

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[3] *See, e.g.*, Opper, *Constitutional Aspects of the Single Business Tax Act*, 22 Wayne L. Review 1167, 1168-1171 (1976), quoting from the Department's *Single Business Tax Questions and Answers* (June 5, 1976), "We conclude that as the SBT is not an income tax or measured by net income, that [15 USC §381 (1976)] will not be used to determine nexus."

[4] *See, Trinova Corp. v. Dept. of Treasury*, 433 Mich. 141, 149 N.W.2d 428 (1989), *aff'd* 498 U.S. 358 (1991), *Mobil Oil Corp. v. Dept. of Treasury*, 422 Mich. 473, 493-495, 373 N.W.2d 730 (1985); *Town & Country Dodge, Inc. v. Dept. of Treasury*, 152 Mich. App. 748, 755, 395 N.W.2d 472 (1986), *Wismer & Becker Contracting Engineers v. Dept. of Treasury*, 146 Mich. App. 690, 696, 382 N.W.2d 505 (1985).

[5] PL 86-272 was the jurisdictional standard from 1980, when the Department issued its SBT Bulletin 1980-1, until the Court of Appeals decision in *Gillette* in 1993.

"Notice of Inquiry". App. 61a-62a. The Notice of Inquiry notified the nearly 3,000 identified potential taxpayers that, because they had Michigan resident employees, under the new DP/CC tests they were now subject to Michigan's SBT jurisdiction. Although the *Gillette* decision gave the new DP/CC tests full retroactivity to 1976, the Notice of Inquiry gave the *Gillette* decision only limited retroactivity, requesting voluntary retroactive SBT returns and payments for tax years ending after 1988, with interest but without penalty. App. 61a-62a.

Of the nearly 3,000 identified potential SBT taxpayers to whom the Notice of Inquiry was sent, 727 accepted the limited retroactive application of the new DP/CC tests. The Department collected $27,000,000 in delinquent SBT taxes and interest for 1989 and subsequent tax years. App. 63a.

On April 11, 1995, **over 1-1/3 years after the Notice of Inquiry partial amnesty program was initiated,** the Department issued its final assessment against Cosmair for the 1984-1988 tax years, in the amount of $371,591.61 in taxes and interest, basing its jurisdictional assertion on the new DP/CC tests, retroactively applied to 1984. App. 61a. Neither the final assessment against Cosmair, nor the Department's hearing referee's recommendation that it be issued, was based upon the PL 86-272 jurisdictional test. App. 60a, 63a. Jurisdiction over Cosmair for tax years 1984 through 1988 was solely established under the new DP/CC tests which the Department had refused to apply to the favored 3,000 potential taxpayers it had identified. Cosmair asked that it be offered the same notice of inquiry arrangement offered the approximately 3,000 SBT taxpayers. The Department refused. App. 62a-63a.

2. Applicable Michigan Constitutional and Statutory Provisions

The "law" as to which Cosmair is entitled to equal protection, is the Michigan Constitution, statutes, and the law declared by the Court of Appeals in *Gillette*. (The Department's admitted unilateral administrative policy here challenged was not

"the law", indeed, it was an administrative policy adopted in violation of established Michigan law.)

The Michigan Constitution reposes the entire power to enact tax laws in the Michigan legislature. (Mich. Const. 1963, art. 9, § 1 and § 2) App. 37a. Further, Michigan's Constitution mandates that "[e]very tax other than general ad valorem property tax shall be uniform upon the class or classes on which it operates." (Mich. Const. 1963, art 9, § 3) App. 37a-38a.

The Michigan Commissioner of Revenue and the Department of Treasury, as the tax assessor/collector, are a part of the executive branch of government and have no taxing powers or authority other than as delegated by the Legislature. The Commissioner of Revenue derives his authority to administer the SBTA solely from the Department of Revenue Act, MICH. COMP. LAWS. § 205.1 (the "Revenue Act"). The stated purpose of the Revenue Act was to make the Department of Treasury Michigan's "tax collection agency" to provide, *inter alia*, a "specialized service for tax enforcement, through establishment and maintenance of uniformity in definition, regulation, return and payment." MICH. COMP. LAWS. § 205.1. App. 40a.

The Commissioner of Revenue's duties under the Revenue Act and SBT Act are mandatory. The statutory mandates are unequivocal. Section 27a (2) of the Revenue Act (MICH. COMP. LAWS. § 205.27a(2)), provides: "A person who has failed to file a return is liable for all taxes due for the entire period for which the person would be subject to the taxes." App. 41a-42a. Taxes are "due" on the statutory date for filing the return. (MICH. COMP. LAWS. §208.73(1).) App. 44a.[6] Further, Section 24(1) of the Revenue Act (MICH. COMP. LAWS. § 205.24(1)), mandates, "[if] a taxpayer fails or refuses to file a return or pay a tax administered under this act within the time specified, the department, as soon as possible, shall assess the tax against the taxpayer." (emphasis added). App. 46a. Section 28(1)(e) of the Revenue Act (MICH. COMP. LAWS. §205.28(1)(e)), unequivocally states, "[t]he

[6] If a tax return is not filed, the period of limitations does not run. MICH. COMP. LAWS. § 205.27a(2). App. 44a.

Commissioner or an employee of the Department shall not compromise or reduce in any manner the taxes due to or claimed by the state." (emphasis added)[7] App. 48a-49a.

3. **The Proceedings Below**

(a) The Court of Claims. On July 6, 1995, Cosmair paid the 1984-1988 SBT assessment under protest and brought suit in the Michigan court of claims under Section 22(1) of the Revenue Act. (MICH. COMP. LAWS. §205.22(1).) App. 61a. Cosmair claimed that the Department's intentional and systematic administrative discrimination violated Cosmair's equal protection rights under the United States Constitution, U.S. Const, amend XIV, § 1, Mich. Const. 1963, art 1, § 2. Cosmair asserted that the Department intentionally, systematically and deliberately refused to apply the DP/CC tests to the approximately 3,000 SBT taxpayers it had identified and located for the tax years 1984-1988, the years for which it applied the DP/CC tests to Cosmair. (Amended Complaint ("Ct") ¶s 14, 18, 19). Cosmair further asserted that the Department intentionally, systematically and deliberately refused to extend to Cosmair the same partial amnesty arrangement extended to approximately 3,000 SBT taxpayers. (Ct ¶s 20, 29, 30)

The case was presented to the court of claims on cross-motions for summary disposition based on stipulated facts, which included and incorporated pleadings, various documents and correspondences, and discovery. App. 63a-70a. The court of claims delivered its ruling from the bench. App. 27a-34a. The court missed the pertinent issue entirely, stating,

> Cosmair argues, however, that Treasury's refusal to actively seek out those potential taxpayers constitutes disparate treatment. The heart of this issue is whether Treasury is required to actively seek out all taxpayers who may be subject to the single business tax. Although, as I understand that's not

[7] The Department of Revenue Act takes this prohibition very seriously, making it a felony for anyone who intentionally violates the prohibition. MICH. COMP. LAWS. § 205.28 (2). App. 50a.

> precisely the argument today, I think generally the concept applied.

App. 31a-32a. Cosmair did not argue that the Department was required to seek out unknown potential taxpayers.[8] The Department had already discovered and identified the 3,000 potential taxpayers when it instituted its administratively adopted notice of inquiry program.[9] The court also ruled that Cosmair was not similarly situated with the favored class of 3,000 SBT taxpayers and that the Department had a "rational basis" to justify the disparate treatment.[10] App. 31a.

(b) The Court of Appeals. The Michigan Court of Appeals affirmed the court of claims' ruling.[11] App. 4a. The Court of Appeals, in contravention of the established U.S. Supreme Court precedents on point, applied a rational basis test to analyze the statutorily unauthorized, indeed statutorily prohibited administrative discrimination by the Department. In so holding the the Court of Appeals totally ignored the equal protection test this Court has applied to unauthorized administrative discrimination, recently reiterated by this Court in *Allegheny Pittsburgh v. Webster County*, 488 U.S. 336, 345 (1989).

The Court of Appeals did not address the issue that the Department's unilateral policy of forgiving taxes due for years before 1989 was prohibited by statute. Instead, it concluded, by necessary inference, that the Department did not carry out an unauthorized unilateral policy to forgive taxes due. This was a

[8] The Court of Appeals recognized this error in the court of claims ruling, stating, "the Court of Claims apparently misconstrued some of plaintiff's arguments. . ." App. 3a. The Court of Appeals then incorrectly held that the court of claims nevertheless reached the right result.

[9] At this point, the Department had not even determined to issue a final assessment against Cosmair.

[10] On September 10, 1996, the court of claims entered its order granting the Department summary disposition. App. 35a-36a.

[11] The Court of Appeals denied Cosmair's motion for rehearing on May 13, 1999. App. 5a. On April 28, 1999, the Michigan Supreme Court denied Cosmair's application for leave to appeal, with Cavanaugh, J., voting to grant leave to appeal. App. 6a. On August 31, 1999, the Supreme Court denied Cosmair's motion for reconsideration, with Cavanaugh, J., voting to grant reconsideration. App. 7a.

blatant refusal to acknowledge stipulated facts, which established what the Department had done. In what can only be described as a *"non-sequitur"* conclusion, the Court of Appeals concluded:

> As a threshold matter, we note that plaintiff has mischaracterized defendant's action in this case as an act of amnesty, which would be prohibited by MCL 205.28(1)(e); MSA 7.657(28)(1)(e). Defendant did not forgive this group for any unpaid single business tax assessments for years before 1989, but merely made a decision pursuant to its enforcement power as to how to allocate its resources to achieve the optimal level of compliance. MCL 205.13(h); MSA 7.657(13)(h).

App. 4a. This critical conclusion confused the fact of what had been done, with the excuse for having done it.

The uncontested facts, as stipulated to by the parties, and as confirmed by sworn responses to discovery requests, established that the Department did in fact adopt and carry out this unilateral policy; that it did in fact under its "unilateral policy" issue its written "Notices of Inquiry"; that it did in fact identify and contact the 3,000 favored taxpayers; that it did in fact tell them that it would not enforce the new DP/CC tests retroactively beyond 1989, or assess and collect SBT taxes for pre-1989 years; and that it did in fact thereafter intentionally and systematically apply the new DP/CC jurisdictional tests retroactively to Cosmair and one or two others for years before 1989. App. 61a-63a. These facts were stipulated and not questioned in the record.

The Court of Appeals' reference to MICH. COMP. LAWS. § 205.13(h) (App. 4a), as providing the statutory authority for the Department's unilateral discriminatory enforcement policy is wrong for two reasons. First, there is no subsection (h) in that statutory provision. App. 52a-53a. Second, and more importantly, that section simply authorizes the Department to administer and enforce various laws previously administered by other state departments. Nowhere in MICH. COMP. LAWS. § 205.13, or in any other Michigan statute, is the Department granted statutory authority or discretion

which would permit it to agree not to assess and collect SBT taxes from the 3,000 taxpayers for pre-1989 tax years.

REASONS FOR GRANTING THE PETITION

The decision of the Michigan Court of Appeals warrants review by this Court for four compelling reasons. First, the Court of Appeals decision contravenes the controlling decisions of this Court. These decisions affirmed that the long-established test for unconstitutional administrative discrimination in the administration of a state's tax laws is the test recently reiterated in *Allegheny-Pittsburgh Coal Co v. Webster County,* 488 U.S. 336, 345 (1988), that intentional, systematic administrative discrimination by officials charged with the duty of administering a tax statute violates the equal protection rights of those discriminated against.

This Court's decision in *Allegheny-Pittsburgh, supra*, affirmed the longstanding test for alleged unconstitutional administrative discrimination under a state tax statute. The final decision of the Court of Appeals, however, refused to apply this test, instead affirming unauthorized intentional and systematic administrative discrimination by the Department in enforcing a Michigan tax by applying the rational basis test to the unauthorized administrative classification. Under the "intentional and systematic discrimination" test established over 80 years ago, and since then relied upon by scores of decisions in the lower federal courts and state courts, no "rational basis test" is applied to test the constitutionality of unauthorized, indeed statutorily prohibited, administrative discrimination. It has been suggested that the modern equal protection jurisprudence of this Supreme Court requires a rational basis review and has therefore superceded and overturned *sub silentio* this Court's long-standing precedents establishing the "intentional and systematic" test for dealing with unauthorized administrative discrimination. (*See, e.g., Nordlinger v Hahn*, 505 U.S. 1, 24-25 (1992), Justice Thomas concurring.) Petitioner respectfully submits that unauthorized administrative discrimination, which is intentional and systematic, denies equal protection of the very tax law that the administrator was charged with administering and enforcing. To apply a rational basis analysis to test the administrator's statutorily unauthorized and

prohibited discriminatory classification, permits an employee of the executive branch of the State government to usurp the power of the state legislature and judicial system to create the law of the state as to which the United States Constitution guarantees Equal Protection. Indeed under the established state "law", the actions of the administrator were unauthorized and prohibited. There are, accordingly, good reasons to distinguish between the test for unconstitutional discrimination by the tax statutes of a state as opposed to unconstitutional administrative discrimination, which is intentional, systematic and unauthorized by the tax law of the state. The tension between this Court's affirmation of the longstanding administrative discrimination test in *Allegheny-Pittsburgh, supra*, and its subsequent application of the rational basis test, distinguishing *Allegheny-Pittsburgh* as a "rare case" in *Nordlinger*, 505 U.S. at 16, has lead to situations such as that before this Court in this Petition, where some state courts believe they may ignore the long-established "intentional and systematic" tests to determine the constitutionality of unauthorized administrative discrimination.

Second, should this Court determine that a rational basis review is appropriate to test the Federal Equal Protection constitutionality of unauthorized and prohibited administrative discrimination in enforcing a state's tax statute, another issue arises. This involves the question whether the administrator can advance rational bases for the intentional and systematic unauthorized discriminatory administration of the tax statute, which rational bases are contradicted by the legislative declaration of purpose in the statute under which the administrator acts. Put differently, can the state administrator justify intentional and systematic administrative discrimination in enforcing a state tax law, by advancing a rational basis for the discriminatory administrative classification which rational basis was rejected by the legislature in enacting the statutes levying the tax and authorizing the administrator to enforce the tax? The Court of Appeals in the instant case in justifying the unauthorized, indeed prohibited, administrative discrimination by the several "rational bases" advanced by the administrator, ignored the Legislature's stated uniform administration policy in the very statute authorizing the administrator to enforce the tax statute. This Court in *Nordlinger*, 505 U.S. at 16, n.7, citing *Allied Stores of Ohio, Inc. v. Bowers*, 358

U.S. 522 (1959), stated that where the statutes left no room to conceive of any other purpose for their existence than that declared by the Legislature, no different rational basis test advanced to justify unauthorized administrative action could be recognized. If the Equal Protection Clause will allow a state tax administrator to ignore the legislature's stated policies and prohibitions and adopt discriminatory tax classifications rejected by the legislature, a very fundamental change in the law has taken place, which should be explained by this Court.

The third question presented by this petition looks to the application of the rational basis test analysis, which the Michigan Court of Appeals concluded was applicable to the statutorily unauthorized and prohibited, intentional and systematic administrative discrimination. The Michigan Court of Appeals refused to consider whether the alleged rational bases for the administrative discrimination could reasonably be conceived to be true or whether they lacked any reasonable support in fact (e.g., *New York State Club Association v City of New York*, 487 U.S. 1, 6-7 (1988)), or whether there was at least some plausible connection between the discrimination and the purpose of the law. (*New York State Club Association, supra,* at 20 (Justice Scalia concurring).) Petitioner established that it was logically impossible for the administrator to have relied upon the rational bases he advanced, after the fact, for the intentional and systematic administrative discrimination. The Court of Appeals nevertheless concluded these bases justified the unauthorized administrative discrimination, notwithstanding the fact there was no plausible relationship between the asserted justifications and the statute under which the administrator acted (which prohibited such action). While the rational basis test has been called "very forgiving," it should not permit intentional and systematic administrative discrimination where the asserted rational bases bear no rational relationship to the challenged discriminatory classification.

Lastly, the Michigan Court's attempt to find Cosmair not similarly situated with the favored 3,000 other potential taxpayers "caught" by the Department under the new DP/CC SBT Act jurisdictional test, ignored the Revenue Act which treats all persons owing taxes not yet paid as a single and assessable class, and

permitted the tax administrator to legislate new tax classes not approved, indeed prohibited, by the legislature. This ruling ignores the distinction between the *Allegheny-Pittsburgh* and *Nordlinger* decisions. Tax classifications, which are constitutionally or statutorily established, are tested by the rational basis approach; unauthorized intentional and systematic administrative classifications are not. Under all applicable constitutional and statutory provisions, Cosmair and the other favored 3,000 potential SBT taxpayers were in the same class. All became subject to SBT Act jurisdiction under the retroactive ruling in the 1993 *Gillette* decision adopting the new jurisdictional tests. The Department intentionally and systematically pursued Cosmair under the new tests for the 1984 through 1988 tax years, after adopting and following its unilateral policy of not pursuing the favored 3,000 for those years under the same jurisdictional tests. Cosmair was forced to pay SBT taxes for years 1984-1988, the other 3,000 potential taxpayers were told they would not be required to pay. This was enough to trigger Cosmair's Federal Equal Protection rights.

I. THE MICHIGAN COURT OF APPEALS DECISION ON AN IMPORTANT QUESTION OF FEDERAL LAW CONFLICTS WITH LONG-STANDING SETTLED DECISIONS OF THIS COURT.

A. The Court of Appeals Use Of A "Rational Basis" Review To Test Unauthorized Administrative Discrimination In Enforcing A State Tax Law Contravenes The Established And Long-Standing Decisions Of This Court.

1. The Established and Long-Standing Decisions of this Court Establish the Test for Unauthorized Intentional and Systematic Administrative Discrimination in Enforcing State Tax Laws.

The test which has been used for nearly 80 years to review administrative discrimination by a state tax administrator was recently reiterated in *Allegheny-Pittsburgh Coal Co. v. Webster County*, 488 U.S. 336 (1989). In that case, the county assessors' unauthorized assessment policy contravened the state's constitution

which required uniformity in assessing. The county assessor valued the petitioner's real property on the basis of its recent purchase price, but made only minor modifications in the assessments on land which had not recently sold. The assessor's assessment practice resulted in gross disparities in assessed values. This Court held that the assessor's statutorily unauthorized aberrational assessment policy denied the petitioners the equal protection of the laws guaranteed to them by the Fourteenth Amendment. *Id.* 343, 344-45. Although the county purported to have a rational basis justifying the assessor's unauthorized assessment practice, this Court rejected such a review, stating the applicable equal protection test as follows:

> '[I]ntentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property.' *Sunday Lake Iron Co., supra* at 352-353; *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445-446 (1923); *Cumberland Coal Co. v. Board of Revision of Tax Assessments in Green Co., Pa.*, 284 U.S. 23, 28-29 (1931).

Id. at 345. This Court went on to state, quoting from *Township of Hillsborough, et al. v. Cromwell*, 326 U.S. 620, 623 (1946):

> 'The equal protection clause. . .protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class."

Id. 345-46. (citation omitted)

The DP/CC jurisdictional tests ordered with full retroactive effect by the Court of Appeals' 1993 *Gillette* decision were equally applicable to Cosmair and the favored 3,000 taxpayers. The Michigan Legislature established the class entitled to equal treatment, being all persons who "failed to file a [SBT] return". (MICH. COMP. LAWS. § 205.27a(2)). App. 42a. Under this statutory provision, all such persons are "liable for all taxes due for the entire

period for which the person would be subject to the taxes." The statute of limitations does not run if a tax return is not filed. MICH. COMP. LAWS. § 205.27a(2). App. 41a-42a. Accordingly, the Department was statutorily required to "assess the tax against [all] taxpayers" not filing a tax return. MICH. COMP. LAWS. § 205.24(1). App. 46a.

The Department's intentional and systematic administrative policy of refusing to enforce the DP/CC jurisdictional tests to the favored 3,000 for open years prior to 1989, while at the same time assessing the SBT taxes due under this jurisdictional test from Cosmair, was not only statutorily unauthorized, but specifically prohibited by Michigan law, which unequivocally mandates that the Department "not compromise or reduce in any manner the taxes due to or claimed by the state." MICH. COMP. LAWS. § 205.28(1)(e) App. 48a-49. Taxes are due on the statutory date for filing the tax return. (MICH. COMP. LAWS. §208.73(1)). App. 44a. Under the long standing rule reiterated by *Allegheny-Pittsburgh* discussed above, these admitted discriminatory administrative actions were unconstitutional under the Equal Protection Clause.

If these unequivocal precedents no longer represent the controlling Federal constitutional law on the constitutionality of State administrative discrimination, it behooves this Supreme Court to say so, otherwise the state courts must be bound by such established U.S. Supreme Court precedent.

2. This Court's Established and Long-Standing Tests for Unauthorized Administrative Discrimination Do Not Permit a Rational Basis Test.

The Court of Appeals' decision applied a "rational basis" review to test the administrative discrimination. This is contrary to this Court's holding in *Allegheny-Pittsburgh*, *supra*, and the long-line of decisions pre-dating *Allegheny*. *See, Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352-53 (1918); *Iowa-DesMoines National Bank v. Bennett*, 284 U.S. 239, 245-46 (1931); *Cumberland Coal Co. v. Board of Revision*, 284 U.S. 23, 28-29 (1931); *Township of Hillsborough v. Cromwell, supra; Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445-46 (1923); *Coulter*

v. Louisville & Nashville Railroad Comp., 196 U.S. 599 (1905). These decisions did not apply a rational basis analysis to test the unconstitutionality of intentional and systematic administrative discrimination.

The Court of Appeals' decision in this case ignored this long line of precedent. Its holding contravenes the well-settled, almost century old, decisions of this Court. If permitted to stand, the Court of Appeals decision will have, in the Michigan state courts, effectively overturned the long standing U.S. Supreme Court precedents prescribing the test to be used when intentional and systematic discrimination in enforcing state tax law is challenged as violating the equal protection of the laws guaranteed under the Fourteenth Amendment.

B. The Administrative Discrimination Equal Protection Test Reiterated By The *Allegheny-Pittsburgh* Decision Must Be Distinguished From The Equal Protection Test Recently Applied To Test State Constitutional Discrimination In *Nordlinger v. Hahn.*

This Court's recent decision in *Allegheny-Pittsburgh* concluded that the Constitution and laws of the State of West Virginia required all property to be taxed at a rate uniform throughout the State, and that there was no different system or practice from that specified by statute which had been valid for so long as to become the implicit law. In those circumstances, this Court held the statutorily unauthorized administrative action was not, and did not establish the law of that state, and because it was intentional and systematic, amounted to administrative discrimination prohibited by the Federal Equal Protection Clause. This Court relied upon *Sunday Lake Iron Co., supra; Sioux City Bridge Co., supra*; *Cumberland Coal Co., supra* and *Hillsborough v. Cromwell, supra*. Those decisions support what had been viewed as an established principle of constitutional law for the better part of a century, that intentional, systematic administrative discrimination by officials charged with the duty of administering tax statutes contravenes the constitutional rights of those discriminated against.

These decisions deal with unauthorized administrative discrimination. They do not deal with discriminatory legislative tax classifications or even with a discriminatory tax classification by an administrator acting under legislatively delegated authority to classify. In contra-distinction to the equally well-established rule that legislative tax classifications may be subjected to the so-called rational basis test, the administrative discrimination cases do not require, or even mention, the "rational basis test" as a basis for justifying otherwise unconstitutional administrative discrimination.

More recently, in the *Nordlinger v. Hahn* decision, a majority of this Court declined to overturn that portion of its decision in *Allegheny-Pittsburgh* which was premised on these longstanding precedents establishing the test for administrative discrimination. (505 U.S. at 16.) This Court did not hold that a rational basis test must now be used to test intentional and systematic administrative discrimination of a state tax statute. *Nordlinger* dealt with alleged discrimination (required) by the California Constitution. Obviously, if such discrimination is authorized by the state constitution, then the rational basis test applicable to test "statutory" tax classifications should be applied. Where the discrimination was administrative and was unauthorized by state constitution, statute or by a long-established system based on an implicit policy applied evenhandedly[12], the *Allegheny-Pittsburgh* test is still applicable. Indeed, the *Allegheny-Pittsburgh* decision itself recognized that had the unauthorized aberrational assessment policy of the Webster County assessor been the established law of the State, this Court's equal protection analysis may have reached a different result. In footnote 4 of its Opinion, this Court, recognizing a distinction between the unauthorized administrative assessment policy by the Webster County assessor, and California's similar assessment method required under its

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[12] *See, Nashville Chattanooga & St. Louis Railway v. Browning, et al.*, 310 U.S. 362, 369 (1940), "Here, according to petitioner's own claim, all the organs of the state are conforming to a practice, systematic, unbroken for more than forty years, and now questioned for the first time. It would be a narrow conception of jurisprudence to confine the nation of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it can establish what is the 'law.'"

Constitution, known as Proposition 13, stated:

> We need not and do not decide today whether the Webster County assessment method would stand on a different footing if it were the law of a State, generally applied, instead of the aberrational enforcement policy it appears to be.

Allegheny-Pittsburgh, 188 U.S. at 344, n.4.

C. This Court's Characterization In Its Recent *Nordlinger* Decision Of The Administrative Discrimination Test Reiterated In *Allegheny-Pittsburgh*, and Justice Thomas' Concurring Opinion In *Nordlinger,* Cast Doubt Upon the Viability of the *Allegheny-Pittsburgh* Test.

The Nordlinger *decision* distinguished the *Allegheny-Pittsburgh* decision as a "...rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme." 505 U.S. at 16. With respect, this statement cast some doubt on the viability of the long-standing decisions finding that unauthorized administrative discrimination of state tax statutes, if intentional and systematic, is unconstitutional.

In fact, Justice Thomas' concurring opinion in *Nordlinger*, recognized the long standing test for unauthorized administrative discrimination, but suggested that the established intentional, systematic discrimination test does not comport with "modern equal protection jurisprudence", and conflicts with current case law. (505 U.S. at 24-25, Thomas, J., concurring). That opinion concludes that this Court's decision in *Nordlinger*, and inferentially in *Allegheny-Pittsburgh*, ". . . has left our equal protection jurisprudence in disarray." *Id.* at 27.

With due respect, Petitioner submits that the long-established decisions properly recognize a distinction between unauthorized administrative discrimination and discrimination by constitutional or statutory provisions. Indeed the *Allegheny-*

Pittsburgh decision itself recognized such a distinction. *Allegheny-Pittsburgh*, 488 U.S. at 344, n.4.

There are several very good reasons why this Court should continue to recognize a distinction between the tests for unconstitutional administrative discrimination, unauthorized by statute or longstanding state practice, and discriminatory statutory classifications. Among these is the fundamental principle that the Fourteenth Amendment protects a state from denying the equal protection of "the law". While the "state action" required to bring the Federal Equal Protection Clause protection into play can involve unauthorized actions by state officers or employees, each state is entitled through its constitution, statutes and judicial decisions, to develop "the law" under which all persons are entitled to equal treatment under the Fourteenth Amendment. A state's law is not established by an administrator acting beyond his statutorily delegated authority in violation of a specific statutory provision. This Court's decision in *Allegheny-Pittsburgh* clearly recognized that one looks to the state constitution, to the state statutes, even to longstanding state practices which, albeit contrary to statute, have been acknowledged as the law, in applying the Equal Protection Clause guarantee.

The intentional, systematic and unauthorized, indeed statutorily and judicially prohibited actions of a state employee should not be tested as if they were the "law" established by the state, with respect to which all persons are entitled to equal treatment. Such unauthorized administrative actions are not the law, and their constitutionality under the Equal Protection Clause should not be tested as if they were the law. This is, in essence, the rationale of this Court's decision in *Allegheny-Pittsburgh* and the reason why the rational bases, which *Allegheny-Pittsburgh* refused to consider, were considered adequate to justify a similar tax scheme in *Nordlinger*.

Nevertheless, the concurring opinion in *Nordlinger* makes a point. The decisions establishing the test for unconstitutional administrative discrimination upon which *Allegheny-Pittsburgh* relied, are almost half a century old, and have not been applied by this Supreme Court, except in its *Allegheny-Pittsburgh* decision, for

some years. This Court's discussion of its *Allegheny-Pittsburgh* holding in its *Nordlinger* decision could be read as restricting the long-established administrative discrimination equal protection law applied in *Allegheny-Pittsburgh,* to "rare cases"[13], and possibly to requiring, for the first time, a rational basis test to justify constitutionally challenged intentional and systematic administrative actions which are unauthorized and prohibited by the legislative and judicial law.

The concurring opinion in *Nordlinger* expressed some concern that any administrator acting contrary to the statute authorizing him to act would give rise to a claim that the equal protection rights of the person bearing the brunt of such action had been violated. (505 U.S. at 27, Thomas J., concurring). The long-standing test applied to administrative discrimination, however, has not given rise to so many claims, as to suggest a change in the long established constitutionality test. This is because the long-established decisions clearly require not only that such action be discriminatory, but also that it be intentional, that is to say not mistaken or inadvertent[14], and that it be systematic.[15] In the area of state and local taxation, great latitude should be left to the states to devise the tax laws which give rise to the revenues needed for their existence. This proposition cannot be assailed. But the instant case deals only with the misapplication of the term "tax law", and suggests that where an administrator acts without authority, indeed discriminates in violation of the tax law established by the people in

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[13] *See, Nordlinger*, 505 U.S. at 16.

[14] *See, Cumberland Coal Comp. v. Board of Revision*, 284 U.S. at 28-29. *See* also, *Snowden v. Hughes*, 321 U.S. 1, 26 (1944), "[W]here the official action purports to be in conformity to the statutory classification, an erroneous or mistaken performance of the statutory duty, although a violation of the statute, is not without more a denial of the equal protection of the laws. The unlawful administration by state officers of a statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."

[15] *See, Snowden v. Hughes, et al.*, 321 U.S. 1, 15 (1944) (Frankfurt, J., concurring), "The talk in some of the cases about systematic discrimination is only a way of indicating that in order to give rise to a constitutional grievance a departure from a norm must be rooted in design and not derived merely from error or fallible judgment."

their constitution, through their legislature by statute and through their judiciary's reported decisions, such actions are not the tax law of the states, and should not be viewed and tested under the Federal Constitution as if they were.

Further, if the State's Constitution, its legislature and its courts have not authorized such actions by the administrator of the tax laws, it can be normally assumed that in most instances one or more of the co-equal branches of state government, the legislature, the executive or the judicial, will deal with such improper behavior and set matters right. Only in those instances where such unauthorized and forbidden yet intentional and systematic tax administration is not dealt with through appropriate state legal processes, should this Court be required to enforce the Federal Equal Protection guarantees.

In the instant case, as was noted by the concurring opinion in *Nordlinger*, the applicable tests to be applied to intentional and systematic administrative discrimination of a state tax law are now unclear. Clarification in this area is badly needed, and should reduce, rather than increase, the number of instances when taxpayers are required to assert their Federal constitutional rights against intentional and systematic administrative state and local tax law discrimination.

II. EVEN IF A "RATIONAL BASIS" REVIEW TO TEST UNAUTHORIZED ADMINISTRATIVE DISCRIMINATION IS DETERMINED TO BE THE APPROPRIATE EQUAL PROTECTION TEST – THE COURT OF APPEALS' DECISION NONETHELESS CONFLICTS WITH SETTLED DECISIONS OF THIS COURT WHICH ESTABLISH THAT WHERE THE LEGISLATIVE POLICY AND PURPOSE IS CLEARLY STATED, A RATIONAL BASIS WHICH CONFLICTS WITH THAT POLICY OR PURPOSE WILL NOT BE INFERRED TO JUSTIFY AN UNAUTHORIZED ADMINISTRATIVE CLASSIFICATION.

A. The Decisions Of This Court Do Not Permit A Court To Infer A Rational Basis To Support Intentional And Systematic Discrimination Where An Inconsistent Statutory Purpose Is Established By The Legislature.

The most recent reiteration of the "intentional and systematic" discrimination test was in *Allegheny-Pittsburgh*. That decision concluded that the "intentional discriminatory assessment" there at issue was not permitted by the law of that State, and was nothing more than the "aberrational enforcement policy" of a tax administrator. 488 U.S. at 345-46. This Court stated:

> But West Virginia has not drawn such a distinction. Its Constitution and laws provide that all property of the kind held by petitioners shall be taxed at a rate uniform throughout the State according to its estimated market value. There is no suggestion in the opinion of the Supreme Court of Appeals of West Virginia, or from any other authoritative source, that the State may have adopted a different system in practice from that specified by statute . . .

Id. at 345. (emphasis added)

Subsequently, in *Nordlinger*, this Court reaffirmed this position, concluding that *Allegheny* was the rare case where ". . . the facts precluded any plausible inference that the reason for the

unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme." 505 U.S. at 16. This Court supported this proposition in footnote 7, citing *Allied Stores of Ohio, Inc. v. Bowers*, 358 US 522, 530 (1959), noting that where statutes specifically declare their purpose, they leave the courts no room to conceive of any other possible purpose for their existence in testing their constitutionality. (*See also, Schweiker v. Wilson,* 450 U.S. 221, 235 (1981).)

B. The Michigan Statute Specifically Declared The Legislative Purpose, Which Is Supported By The Michigan Constitution and Cases, Which Legislative Purpose Precludes the Court of Appeals' Inferred Conflicting Rational Bases For The Challenged Administrative Discrimination.

In the instant appeal the "Constitution and laws" of Michigan "specifically declare that purpose" that the tax law shall be administered in a manner "uniform throughout the State," and "leave no room to conceive of any other possible purpose," to borrow phrases from the *Allegheny, Nordlinger* and *Allied Stores* decisions.

The administrative discrimination in this case took place in the Department's administration and collection of the SBT tax. Section 80(1) of the Single Business Tax Act (MICH. COMP. LAWS. §208.80(1)), which imposed the tax here at issue, provided, "(1) The tax imposed by this act shall be administered by the Revenue Commissioner pursuant to Act No. 122 of the Public Acts of 1941, being Sections 205.1 to 205.30 of the Michigan Compiled Laws, and this Act. . ." (the "Revenue Act"). App. 54a. Section 1(b) of the Revenue Act (MICH. COMP. LAWS. § 205.1), provided,

> "Sec. 1. A tax collection agency is created, to be known as the Revenue Division of the Department of Treasury of the State, for the following purposes:
>
> * * * *
>
> "(b) Specialized service for tax enforcement, through establishment and maintenance of

> uniformity in definition, regulation, return and payment."

(emphasis added). App. 40a. Section 28(1)(e) of the Revenue Act (MICH. COMP. LAWS. § 205.28(1)(e)), further reinforced the legislative purpose by providing, in pertinent part,

> "(e). . .the Commissioner or an employee of the department shall not compromise or reduce in any manner the taxes due to or claimed by the state . . . This subdivision does not prevent a compromise of interest or penalties, or both."

(emphasis added). App. 48a.

The Revenue Act both authorizes and controls the Department's actions in assessing and collecting SBT taxes. Accordingly, the Michigan Court of Appeals, in testing the rational bases advanced, should have looked to see if the Revenue Act had sufficiently specifically declared its purpose, so as to preclude the court from inferring some other conflicting purpose. This it refused to do. The stated purpose of the Revenue Act, in conformity with Article 9, Section 3 of the Michigan Constitution,[16] established beyond any doubt the purpose of the statute authorizing the Department administer the tax was to require and enforce "uniformity . . in return and payment."[17]

Under the Revenue Act the Commissioner not only lacked the authority, but was specifically prohibited from adopting the unilateral administrative policy under which, in exchange for limited voluntary payments, no attempt would be made to collect

[16] In the Michigan Constitution of 1963 as amended, Article 9, Section 3, the people provided, "Every tax other than the general ad valorem property tax shall be uniform upon the class or classes on which it operates." Mich. Const. 1963, art. 9, §3. (emphasis added) App. 37a-38a.

[17] This established policy is also supported by the Michigan decisions. In *Armco Steel v. Dept. of Treasury*, 419 Mich. 582, 593-94, 358 N.W.2d 839 (1984), citing *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 446-47 (1923), a case dealing with Michigan's franchise tax measured by corporate paid-up capital and surplus, the Michigan Supreme Court held that the constitutional requirement of uniformity is ". . . the just and ultimate purpose of the law."

taxes due from thousands of known and identified potential taxpayers, against whom no statute of limitations had run. While this may have been "good business" from the Department's point of view, enabling it to collect substantial taxes with very little effort, it involved intentional and systematic discrimination by the Department which could not be justified given the established purpose of (and prohibition in) the Revenue Act.

The Legislature did not establish as a purpose of the Revenue Act that the Department be authorized to compromise taxes, rather exactly the opposite. Uniform collection was the purpose, compromise was specifically forbidden. Under established Michigan law, absent statutory authority, the person legislatively charged with the duty of tax collection has no discretion to agree not to collect taxes notwithstanding what "good business" practices may suggest. In *School District of the City of Lansing v. City of Lansing*, 264 Mich. 272, 249 N.W. 848 (1933), the Michigan Supreme Court dealt with a city treasurer's arrangements with some taxpayers to permit installment payment of delinquent taxes. Such arrangements were not permitted by statute, which there, as here, unequivocally required the treasurer to collect taxes due. The Michigan Supreme Court noted:

> "Forbearance to levy on promise of installment payments may have been good business, to enable the concerns to attempt to continue in operation and thus benefit both them and the city, but it was not good tax law. The tax law has no humanity or community spirit in its collection features. It demands its pound of flesh."

Id. at 275.

This appeal presents an even stronger argument for this conclusion than did the *Allegheny-Pittsburgh* facts. Here, the only statute authorizing the Commissioner to collect SBT taxes not only appropriately stated that its purpose was to authorize the uniform collection of such taxes, but it specifically forbade the Commissioner from compromising any taxes due. The Legislature could not have been more specific, or more emphatic, in

establishing the relevant statutory purpose. This Court's decisions in *Nordlinger, supra, Allegheny-Pittsburgh, supra,* and *Allied Stores, supra*, precluded the Michigan Court of Appeals from ignoring the stated statutory purpose and hypothesizing some other rational bases for the unauthorized and prohibited, intentional and systematic, administrative discrimination.

III. THE DEPARTMENT'S ASSERTED "RATIONAL BASIS" FOR SUCH CLASSIFICATION COULD NOT HAVE REASONABLY BEEN CONCEIVED TO JUSTIFY THE DISCRIMINATION.

The Court of Appeals concluded the Department had four rational bases which justified disparate treatment, stating:

> Considerations of due process, availability of records, the nonfilers' reliance on defendant's bulletins, and defendant's limited resources reasonably justify defendant's enforcement decision.

App. 4a. Cosmair argued and established in the Court of Appeals that none of the rational bases asserted by the Department, which were adopted without question by the Court of Appeals, had any reasonable support in fact and could not reasonably have been relied upon by the Revenue Commissioner as providing a rational basis for the administrative classification. As stated by this Court in *New York State Club Assoc., Inc. v. City of New York*, 487 U.S. 1 (1988),

> '[T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision-maker.' *Vance v. Bradley*, 440 U.S. 93, 111 (1979). In a case such as this, the plaintiff can carry this burden by submitting evidence to show that the asserted grounds for the legislative classification lack any reasonable support in fact, but this burden is nonetheless a considerable

> one. *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938).

Id. at 7. (emphasis added) (citations omitted).

The "rational bases" relied upon by the Court of Appeals lacked any reasonable support in logic or in fact.

a. The "considerations of due process" excuse. This asserted justification cannot stand even casual scrutiny. The Department has not cited, nor could it cite, any decision limiting the State's ability to apply the new DP/CC tests retroactively four years, as opposed to five, six, seven or eight years. Further, in a final precedential decision binding on the Department, the Michigan Court of Appeals had accorded the change in law full retroactive application to 1976, the first year of the SBTA.

b. The "availability of records" excuse. This asserted justification provides no rational support. If the Court was looking to the Department's ability to meet its burden of establishing jurisdiction to tax, given the substantially reduced contact with the State required to establish DP/CC jurisdiction, employee income tax withholding returns in its possession were are all that the Department needed. The Department had the names and taxpayer identification numbers, and could access such prior returns. The Department's records were adequate. If this "excuse" looks to the potential taxpayers' records, a potential taxpayer, relying upon the PL 86-272 jurisdictional test, would be expected to retain records from prior years knowing that the statute of limitations would not run because it had filed no return and that it might be challenged.

c. The "nonfiler's reliance on defendant's bulletins" excuse. Cosmair, probably more than any of the favored 3000 potential taxpayers, relied on the Department's SBT Jurisdictional Standard Bulletins declaring PL 86-272 as Michigan's jurisdictional standard under the SBTA. Cosmair closed its only Michigan facility in 1983, and organized and conducted its business activities in Michigan so as to avoid liability under the SBT Act. The Department stipulated to this fact. App. 57a. This "non-filer's

reliance" assertion lacks any reasonable support in fact and could not have provided a rational basis.

d. The Department's "limited resources" excuse. The Department's alleged "consideration" that it did not have adequate personnel to pursue the 3000 favored potential taxpayers as a ground for the administrative classification also lacks any reasonable support in fact and could not reasonably have been conceived to be true. No significant additional effort would have been required to insert different language in the Notice of Inquiry giving the DP/CC tests full retroactive application. No "jurisdiction audit" would be necessary, because, when the Department decided to implement its administrative discriminatory policy, it had already located and identified the 3,000 favored potential taxpayers. It knew the name of each potential taxpayer, its Michigan employer I.D. number, its address, and had established the fact that in past years it had paid Michigan employees to work in Michigan. The Department's existing records included the potential taxpayer's Michigan employee withholding returns which are what the Department stipulated it believed it needed to establish DP/CC jurisdiction. The employee withholding return computer sweep had involved considerable effort, but this work was finished. Any audits to prior years' verify taxes voluntarily paid would have to be performed for the tax years 1989 to 1993 in any event. The Revenue Commissioner, as a decision-maker, could not rationally have based his unilateral policy decision on this consideration, and it therefore could not provide a rational basis for the admitted discrimination.

In short, all of the purported "rational bases" asserted by the Department "lack any reasonable support in fact" and "could not have reasonably been conceived to be true" by the Revenue Commissioner. The Court of Appeals refused to consider this fact.

IV. THE COURT OF APPEALS' CONCLUSION THAT COSMAIR WAS NOT SIMILARLY SITUATED WITH THE FAVORED 3,000 TOTALLY CONTRADICTS THE ESTABLISHED DECISIONS OF THIS COURT

The Michigan Court attempted to justify intentional and systematic administrative discrimination by concluding:

> Plaintiff was not similarly situated to the group of potential taxpayers that received defendant's notice. Plaintiff had a pending matter before defendant, had not relied on the application of PL 86-272 in its decision to conduct business in Michigan, believed that the *Gillette* decision could impact its pending matter before defendant, and had prior notice that defendant considered plaintiff liable for the single business tax in Michigan for years prior to 1989. In contrast, the class of potential taxpayers did not have pending matters before defendant, had not been previously audited by defendant, and were effectively without notice of their single business tax liability in Michigan until this Court issued its decision in *Gillette*.

App. 3a.

The Court of Appeals' conclusion completely missed the point of the many controlling U.S. Supreme Court precedents. In the *Allegheny-Pittsburgh* decision, for example, were the Michigan Court's approach acceptable, the tax assessor could easily have justified placing the complaining taxpayer in a different administrative sub-class, because it was a coal company or because its property had recently sold, and the other favored taxpayers were not coal companies and had not recently purchased. This Court refused such simplistic and superficial distinctions, not because they could not be reasonable bases for legislative classification, but rather, because of the established West Virginia law, its Constitution and statutes, required uniform assessments and did not permit such administrative classification. The West Virginia Constitution or legislature could have taxed coal companies

differently, and as the *Nordlinger* decision established, could have permitted different assessment practices where there had been a recent sale. But the tax administrator could not in administering the tax law create such classifications where they were forbidden by the State Constitution and statutes the administrator was charged to enforce it.

As was established above, the class created by the Legislature is "all persons" who failed to pay SBT taxes. This is the class to which the Department was statutorily mandated to assess SBT taxes for all open years. The 3,000 potential SBT taxpayers the Department located and identified had not paid SBT taxes. The Department was, therefore, statutorily required to enforce the DP/CC jurisdictional test, and to assess SBT taxes, against this group "for all open years". Also, as was established above, the Revenue Act likewise specifically established a legislative policy of uniform tax returns and payment, expressly forbidding any compromise by the administrator. Only the legislature, not the administrator, is empowered to create any exceptions or sub-classes to be treated differently.

The Michigan Court of Appeals' conclusion that Cosmair was not similarly situated, in this state law context, relied on factual distinctions which only the legislature had the constitutional power to recognize, but which the tax administrator had no authority, indeed was statutorily forbidden, to enforce.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

STATE OF MICHIGAN
COURT OF APPEALS

COSMAIR, INC.,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee

UNPUBLISHED
March 20, 1998

No. 198240
Court of Claims

Before: McDonald, P.J., and Sawyer and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the Court of Claims denying plaintiff's motion for summary disposition and granting defendant's cross-motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Prior to 1993, the parties believed that PL 80-272, which is codified at 15 USC 381, protected businesses that merely solicited orders in Michigan from being subject to the single business tax under MCL 208.1 *et seq.;* MSA 7.558(1) *et seq.* After closing its Michigan facility in 1983, Plaintiff opined that it was no longer subject to the single business tax, although it nevertheless paid the tax for 1984-88. Defendant, which denied plaintiff's subsequent requests for refunds, disagreed with plaintiff's interpretation of PL 86-272 and twice advised plaintiff that its activities were sufficient to establish defendant's jurisdiction to assess the single business tax. Plaintiff requested that defendant postpone its hearing and final tax assessment until this Court issued its decision in *Gillette Co v Dep 't of Treasury,* 198 Mich App 303; 497 NW2d 595 (1993).

In *Gillette, supra* at 311, this Court found that PL 86-272 was inapplicable to the imposition of the single business tax and that such taxation would instead depend upon an analysis under the process and commerce clauses ("the DP/CC test"). Ultimately, this Court held that the DP/CC test did not prevent the retroactive imposition of the single business tax against Gillette for tax years 1976-81. *Id.* at 311-314. Defendant subsequently notified nonfiling potential taxpayers who were no longer protected by PL 86-272 that they were subject to defendant's jurisdiction according to the decision in *Gillette;* however, the notice also stated that recipients of the notice would be permitted to voluntarily pay the single business tax for the years 1989-93, with interest but without penalty. Defendant did not send the notice to plaintiff and refused to extend the same option to plaintiff when plaintiff requested it. Plaintiff argues that defendant's retroactive application to plaintiff of the DP/CC test for tax years 1984-88 is a violation of plaintiff's constitutional rights to equal protection and uniform taxation because it is not being treated the same as the nonfiling potential taxpayers, to whom defendant did not apply the test beyond 1989.[1]

---

[1] In a related argument, plaintiff asserts that defendant's disparate treatment is also attributable to defendant's "re-adoption" of the test enunciated in PL 86-272, despite this Court's holding in *Gillette, supra.* Specifically, plaintiff argues that defendant used plaintiff's alleged liability under 86-272 to distinguish between plaintiff and the group of non-filing potential taxpayers, which had not been liable for the single business tax under PL 86-272. According to plaintiff, this would an unlawful distinction to draw and would require reversal, much like reversal was required in *Armco, supra,* where the department used an improper means of distinguishing between two groups of taxpayers. However, even assuming that we were willing to engage in the now futile analysis of whether plaintiff is liable under PL 86-272, a resolution of this argument in plaintiff's favor would not alter our holding in this case. Our holding depends on various other factors establishing that plaintiff was not similarly situated to the group receiving defendant's notice and establishing that defendant's disparate treatment had a rational basis. Indeed, it is not the topic or outcome of plaintiff's litigation with defendant that set plaintiff apart from the others but the very fact that the parties were engaged in litigation and therefore were previously known to one another.

We review de novo the decision of the Court of Claims to grant defendant summary disposition. *Gainey Transportation Service, Inc v Dep't of Treasury,* 209 Mich App 504, 506; 531 NW2d 774 (1995). Although the Court of Claims apparently misconstrued some of plaintiff's arguments, we nonetheless affirm its decision to grant defendant summary disposition as the right result in this case. *General Aviation, Inc v Capital Regional Airport Authority (On Remand*), 224 Mich App 710, 716; 569 NW2d 883 (1997). We hold that plaintiff's rights were not violated because it was not similarly situated to the class of taxpayers receiving the notice and because there was a rational basis for defendant's disparate treatment.

Equal protection of the law is guaranteed by both the federal and Michigan constitutions. US Const Am XIV; Const 1963, art 1, § 2. The Michigan Constitution also guarantees uniformity of taxation. Const 1963, art 9, § 3. These constitutional rights require that similarly situated taxpayers be treated equally and that any disparate treatment have a rational basis. *Armco Steel Corp v Dep't of Treasury,* 419 Mich 582, 592; 358 NW2d 839 (1984). A rational basis for disparate treatment exists when a set of facts can be reasonably conceived to justify the alleged discrimination and disparate treatment is not invalid merely because it results in some inequity. *St Louis v Michigan Underground Storage Tank Financial Assurance Policy Bd,* 215 Mich App 69, 73; 544 NW2d 705 (1996).

Plaintiff was not similarly situated to the group of potential taxpayers that received defendant's notice. Plaintiff had a pending matter before defendant, had not relied on the application of PL 86-272 in its decision to conduct business in Michigan, believed that the *Gillette* decision could impact its pending matter before defendant, and had prior notice that defendant considered plaintiff liable for the single business tax in Michigan for years prior to 1989. In contrast, the class of potential taxpayers did not have pending matters before defendant, had not been previously audited by defendant, and were effectively without notice of their single business tax liability in Michigan until this Court issued its decision in *Gillette*.

Additionally, a rational basis exists for defendant's disparate treatment. As a threshold matter, we note that plaintiff has mischaracterized defendant's action in this case toward the nonfiling potential taxpayers as an act of amnesty, which would be prohibited by MCL 205.28(1)(e); MSA 7.657(28)(1)(e). Defendant did not forgive this group for any unpaid single business tax assessments for tax years before 1989, but merely made a decision pursuant to its enforcement power as to how to allocate its resources to achieve the optimal level of compliance 205.13(h), MSA 7.657(13)(h). Considerations of due process, availability of records, the nonfilers' reliance on defendant's bulletins, and defendant's limited resources reasonably justify defendant's enforcement decision. Although plaintiff believes that it has been treated more harshly, disparate treatment is not invalid merely because it results in some inequity. *St Louis, supra at 73.*
Affirmed.

/s/ Gary K. McDonald
/s/ David H. Sawyer
/s/ Joel P. Hoekstra

APPENDIX B

Court of Appeals, State of Michigan

ORDER

Cosmair Inc v Department of Treasury

Docket No. 198240

LC No 95-015815 CM

Gary R. McDonald
Presiding Judge

David H. Sawyer

Joel P. Hoekstra
Judges

The Court orders that plaintiff's motion for rehearing is DENIED.

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

[SEAL] May 13, 1998
Date

/s/ Carl L. Gromek
Chief Clerk

APPENDIX C

ORDER
Entered: April 28, 1999

Michigan Supreme Court
Lansing, Michigan

112342

Elizabeth A. Weaver,
Chief Justice

James H. Brickley
Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.,
Justices

COSMAIR, INC.,

Plaintiff-Appellant,

v

SC: 112342
COA 198240
Ct of Claim: 95-15815-CM

DEPARTMENT OF TREASURY

Defendant-Appellee.

On order of the Court, the application for leave to appeal from the March 20, 1998, decision of the Court of Appeals, is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Cavanagh, J., would grant leave to appeal.

fO824

(SEAL) I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 28, 1999 /s/ Corbin R. Davis
Clerk

APPENDIX D

ORDER
Entered: August 31, 1999

Michigan Supreme Court
Lansing, Michigan

112342 (49)

Elizabeth A. Weaver,
Chief Justice

James H. Brickley
Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.,
Justices

COSMAIR, INC.,

Plaintiff-Appellee, (sic)

v

SC: 112342
COA 198240
Ct of Claim: 95-15815-CM

DEPARTMENT OF TREASURY

Defendant-Appellant. (sic)

On order of the Court, the motion for reconsideration of this Court's order of April 28, 1999 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

Cavanagh, J., would grant the motion for reconsideration, and on reconsideration would grant leave to appeal.

dO824

(SEAL) I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

August 31, 1999

/s/ Jacqueline B. McKinnon
Deputy Clerk

APPENDIX E

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

COSMAIR, INC.,

Plaintiff,

- v - File No. 95-15815-CM

REVENUE DIVISION OF THE DEPARTMENT OF TREASURY OF THE STATE OF MICHIGAN, and DEPARTMENT OF TREASURY OF THE STATE OF MICHIGAN.

Defendants.
_____/

MOTION FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE MICHAEL G. HARRISON,
CIRCUIT COURT JUDGE

LANSING, MICHIGAN - FRIDAY, AUGUST 16, 1996

APPEARANCES:

For the Plaintiff: SAMUEL J. McKIM, III (P-15815)
JOANNE B. FAYCURRY (P-40993)
150 West Jefferson, Suite 2500
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For the Defendant: TERRY P. GOMOLL (P-14148)
Assistant Attorney general
First Floor, Treasury Building
Lansing, MI 48922

Reported by: Jody A. Larsen, CSR-4224

Official Court Reporter

* * *

Lansing, Michigan
Friday, August 16, 1996
2:04 p.m., approximately

RECORD

THE COURT: All right. This is the time set for argument in the matter of Cosmair versus The Department of Treasury. You may proceed.

I would advise counsel I have reviewed your briefs. You have cross-motions, so I don't know who would be first?

MR. McKIM: Who would you prefer, your Honor, that argues first?

THE COURT: It doesn't matter to me. I guess you can go first. You're the plaintiff.

MR. GOMOLL: Go ahead.

MR. McKIM: With your permission then, your Honor, the plaintiff will argue first.

Your Honor, for the record my name is Samuel McKim. And I'm with my colleague, Joanne Faycurry, representing the plaintiff, Cosmair, in this proceeding.

It is sometimes useful -- or at least it so seems to me, your Honor -- in what can be rather complex tax cases to at least start by reducing the issues perceived to be involved to their basic and simplest form. And I'll start that way, with your permission.

In 1993 the Michigan Court of Appeals, in the Gillette opinion, handed down a ruling that the correct test for determining

jurisdiction under the single business tax were the Due Process and Commerce Clause tests as most recently enunciated by the U. S. Supreme Court in its Quill decision.

The 1993 Michigan Court of Appeals' opinion in Gillette said: These are the tests. They are the only tests. And they are to be applied to all the way back to the incipiency of the single business tax in 1990 -- 1976.

And as it happens, Gillette was involved in 1976 in that proceeding. And the Michigan Court of Appeals applied the new test that it announced in '93 retroactively to Gillette all the way back to 1976.

In this proceeding, that fact having been established, Cosmair suggests, your Honor, that its case can be boiled down to two statements. It wants the same tests to be applied to it, and it wants the same tests to be applied to it for the same period as they are to all other potential single business tax taxpayers. The same tests for the same period as all other potential single business tax taxpayers.

And it is, of course, to potential single business tax taxpayers that one applies the jurisdictional tests. Because applying the tests determines whether they're merely potential or whether in fact they should be single business tax taxpayers.

Cosmair does not ask this Court today to invalidate or find unconstitutional the Department's administrative amnesty program, which treated nearly 3,000 other known, potential, single business tax taxpayers differently than in Gillette -- pardon me, differently than in Gillette and differently than with Cosmair with respect to these two jurisdictional tests.

Cosmair asks only that it -- and to the best of its knowledge, per discovery, two other taxpayers in the State of Michigan -- be treated the same as the nearly 3,000 known, potential taxpayers who were treated differently and more favorably. This is in its essence then an equal protection, uniformity case.

The most recent enunciation of the Michigan view of equal protection and uniformity is the MCI case decided by the Court of Appeals in 1994. The Supreme Court denied leave.

There the MCI court reiterated from Sunday Lake Iron, which is one of the classic U.S. Supreme Court cases establishing this doctrine, which did come from Michigan -- reiterated from Sunday Lake Iron, quoting:

> "Petitioner must show that respondent, one, failed to tax similarly situated enterprises; and, two, that its failure to do so was intentional and knowing, rather than mistaken or the result of inadvertence."

Those are the two tests from Sunday Lake Iron. MCI picked them up in Michigan. They are the tests essentially throughout the country for unconstitutional administrative discrimination.

We respectfully submit that on the facts and the record we have established both elements where tests were met.

In this case the Defendant Department failed to tax under the Gillette jurisdictional test, the only test that can be applied in Michigan, failed to tax nearly -- or to attempt to tax nearly 3,000 other known, potential taxpayers for the years it wishes to apply those tests to Gillette.

Secondly, this was not the result of inadvertence or mistake, but was the result of an administrative policy decision intentionally adopted by the Department. The two tests are met.

In the MCI case the Department was held not to have knowingly or intentionally failed to tax AT&T, its competitor, which it argued was similarly circumstanced factually but hadn't been taxed as it had.

The Tax Tribunal held that was inadvertent. The Court of Appeals held that the facts supported that ruling. And the Court of Appeals said because it was inadvertent and not intentional, and of that reason only, the failure to treat AT&T similarly did not violate the Constitution.

How does the Department here distinguish the MCI, Sunday Lake Iron unconstitutional administrative discrimination ruling and tests? It uses essentially two approaches.

First, it argues that once caught in administrative discrimination under MCI, it need only clean up its act, so to speak, in the future.

I would state for the record, your Honor, I had the privilege of representing AT&T after the MCI decision was handed down. The Department did not take that view at that point in time. Because after the May 1994 decision in MCI, the Department back-assessed AT&T as far as the statute of limitations would permit them, back to July 1st, 1980. And the tax and interest approached 100 million dollars.

So after the MCI test the Department did not simply say: Well, we'll do it right in the future. They did what we submit should be done. The statute against M -- against AT&T had not run. They, therefore, went back and assessed what the Court of Appeals had told them was a proper tax, albeit they mistakenly didn't know it. They assessed it back against AT&T, reaching back as far as the statute would permit.

For the record that's assessment number A119936. And the Tax Tribunal decision was Tax Tribunal Docket Number 104140, something of which this Court can take jurisdictional notice.

The Department must, we submit, under MCI, within the applicable statute of limitations, remedy the unconstitutional discrimination. And it must do so acting uniformly and administering the tax uniformly for all open years.

And that is the critical statement. Because here, with respect to the so-called favored 3,000 that were favored over my client, Cosmair, all years were open. No statute of limitations runs when a taxpayer or potential taxpayer does not file a tax return.

But to remedy the discrimination, the Department cannot now go back and do to the 3,000 what it has done to Cosmair. Because it has agreed with them that it will not do that. And indeed, seven-hundred-some of the them have filed voluntary returns totaling nearly 30 million dollars based on the Department's assurance that it will not treat them as it has Cosmair.

Therefore, under McKesson, the recent U.S. Supreme Court decision in McKesson, there is only one way to remedy the unconstitutional discrimination. And that, with respect to Cosmair and the two other cases of which we have knowledge, is to eliminate the tax against the three that was not levied against the 3,000. The Department's second attempt to -- and I should note, your Honor, if there is ever a conflict between the statutory provision and a constitutional provision in the tax area, and between the uniformity and equal protection constitutional guarantees, the Michigan courts and the federal courts have uniformly held uniformity in equality takes priority. I would cite McKesson, Titus, Armco, Sioux City Bridge.

It is well-recognized if there's ever a conflict between two constitutional -- or a statute and a constitutional provision, and one is uniformity of equality, uniformity of equality in the tax area must take priority.

The Department's second attempt to escape the MCI doctrine is to argue that the two subclasses which were given different administrative treatment were not similarly situated.

This is where it failed in the Armco case. Cosmair has established that the two classes were really only one. All were known, potential taxpayers. And it is to known, potential taxpayers that the jurisdictional test must be applied.

There is no legitimate reason to divide that class into 3,000 on one side and 3 on the other. The fact the Department had audited Cosmair, but before assessing Cosmair -- before assessing Cosmair chose not to audit the 3,000 other known, potential taxpayers, is not a valid point of distinction. The Department created this distinction by the unconstitutional acts of which we complained.

And I would note the assessment against Cosmair was handed down in January of 1995. The Department's creation of the special class and the administrative amnesty was in November of 1993, well over a year before the assessment in Cosmair.

There's been a lot of talk in this case by the Department about unknown taxpayers. When the Department assessed Cosmair under an approach it didn't use with respect to the others, it had known about the others. It had communicated it with the others. It had opened its files on the others. It had received between twenty and thirty million dollars from the others. And seven-hundred-some of the others had already filed tax returns. They were known to the Department well before the Department issued the assessment from which we appeal in this case against Cosmair.

The Department says it had an open file against Cosmair. When Cosmair was assessed, your Honor -- and that's the critical date -- the Department had open files with respect to the other 3,000 with respect to whom it had communicated and the seven-hundred-some-odd who had already filed returns.

And so with each of the Department's attempts to justify its creation of two classes, the brief has dealt with these in detail. Absent questions, I'll move on. There is no justification.

Next the Department pleads administrative convenience. But clearly it could have dealt, if it chose, with the two classes equally. And there were ample funds to more than pay for the effort, as both the Court of Appeals' decisions held in the case that was decided by the Supreme Court as Armco. This is not justifiable administrative inconvenience which will justify discrimination.

Next the Department pleads the Gillette decision only acted retroactively on pending cases. But Gillette's case was not pending when the Department created their favored class in November of 1993. Gillette wasn't even assessed until 1995. The case in this court wasn't started until after that.

Gillette only had an open file in the Department. It hadn't even yet been formally assessed -- pardon me, I say Cosmair -- Cosmair only had an open file in the Department. It hadn't even yet been assessed when Gillette was handed down. And when the favored class was created it had not been assessed and wouldn't be assessed for as long as a year after that.

Further, in Michigan cases are retroactively applied unless the Court says to the contrary. And they are retroactively applied, not as the Department contends only to pending cases, they are retroactively applied to pending cases and causes of action that have not yet been reduced to litigation, pending and future cases.

There is no rule that says Michigan Supreme Court decision is only applied to pending cases. It applies to all causes of action and pending cases.

Next, the Department attempts to readopt Public Law 86-272, which was rejected as a single business tax jurisdictional test by the Court of Appeals in Gillette.

It now tests -- it's a threshold test. There are two steps it says that it wants to follow in order to justify its discrimination against my client.

First, it says it will impose the 86-272 jurisdictional test as a threshold test. And if it finds that my client was taxable, then it will impose the test the Court of Appeals said should be applied.

There are so many answers to that one I'll mention only several in passing. First, the Gillette Court of Appeals rejected appeal 86-272 test as a jurisdictional test under the single business

tax. I represented Gillette. I argued for that test. So did the Department.

The Court of Appeals refused to even consider our arguments, rejecting the test as inapplicable and moving on to the Due Process, Commerce Clause test that it selected sua sponte.

So the Court of Appeals has already held: The 86-272 test is one that we will not apply in Michigan under the single business tax. I was there. That's what the opinion says. The Department is wrong to say we should go back and try to do it again.

Secondly, the Court in Gillette refused to do what the Department now asks to be done. Gillette was found liable all the way back to 1976 under the new tests. And we said: Please, Court, tell us if under 86-272 we would have been liable, because we relied on that.

The Court refused. It refused to apply 86-272 as a threshold test. It would not do it. And yet the Court -- this Court is now being asked by the Department to do what the Court of Appeals refused to do.

Third, the Department did not apply the 86-272 test as a threshold test to anyone. Certainly not to Cosmair. The assessment in this case is based on a hearing referee's memorandum opinion. And it does not hold that Cosmair would be taxable under 86-272.

The assessment is accompanied by a decision and order of determination. And it does not hold that Cosmair would be subject to tax under 86-272 if this were a legitimate threshold test. The Department did not issue its assessment based on that test. And in this proceeding, here in this court, it's not been proven that my client would have been assessed under 86-272.

Next, the Department argues that it can selectively pursue whomever it chooses in administering the tax law. The doctrine of selective prosecution is not applicable in Michigan tax law. In MCI the Court did not say: Well, gee, Department, why didn't you tell

us you chose to go after MCI and not AT&T. That would have been okay.

That's not what the Court said. It said: You must treat each equally. And you cannot argue that you decided selectively to pick one and not the other. That's not tax law in Michigan.

More importantly here, the Department did not merely in good faith while attempting to uniformly administer the act, miss a few taxpayers. It intentionally established an entire class of 3,000 known -- known, potential taxpayers and agreed -- agreed not to apply the same test to them which it later -- a year and a half later in its assessment applied to Cosmair . This is not selective prosecution.

The Department argues: Well, we'd like to have gone back after the other 3,000, but without an opinion from the Attorney General, we concluded on our own book that due process would have precluded us from doing that. The Court of Appeals did it in Gillette, but the Department concluded it couldn't.

So it said: Since we couldn't go after the others under the Due Process Clause, we can discriminate against you, Gillette, and you, Cosmair, because we can go after you. You knew that we were assessing it.

The answer to that is simple. The McKesson, Titus, in re General Motors, Armco cases hold that if a conflict in inequality of uniformity is paramount, and if you can't equally assess the tax under the Due Process Clause, then you must not assess the tax discriminatorily against those few people who would not have a due process argument.

THE COURT: About three minutes.

MR. McKIM: The Department argues that there is a need for a finality, saying the principles of uniformity and equal protection are limited by the need for finality by due process -- by due process. They cite the Beam case.

The Beam case did not so hold. All it held is when under res judicata or the statute of limitations a matter is closed, a new decision from the appellate courts will not reopen it. And that is not what we are dealing with here today.

I think, your Honor, I'll reserve that very short period of time for any necessary reply.

THE COURT: All right. Thank you.

MR. McKIM: Thank you.

THE COURT: Mr. Gomoll

MR. GOMOLL: May it please the Court, I'm Assistant Attorney General Terry Gomoll, representing The Department of Treasury in this matter.

As Mr. McKim indicated, on March 1st, 1993, the Court of Appeals issued its decision in the Gillette case. And it also issued its decision in the Guardian Industires case.

In Gillette the Court of Appeals determined that Public Law 86-272 was not applicable to the single business tax. And accordingly the nexus standard, which should be applied to the singled business tax, was a Due Process, Commerce Clause nexus standard.

The Court of Appeals then applied the Due Process, Commerce Clause to Gillette for the years 1976 through 1981 -- those are the years in controversy in the Gillette -- and concluded that Gillette had substantial nexus and was subject to the single business tax.

In Guardian Industries the Court of Appeals determined that Public Law 86-272 was not applicable to determining whether a Michigan taxpayer was taxable in another state, and that the proper test for such a determination was, again, the Due Process, Commerce Clause nexus test.

The result of Guardian and Gillette was a changing of tests for those businesses involved in the sale of tangible, personal property. For those businesses not involved in the sale of tangible, personal property nothing changed, because Public Law 86-272 was not applicable to such businesses.

After the Court of Appeals' decisions in Guardian and Gillette, the courts, the Tribunal, and the Department have applied those decisions to all pending matters.

As indicated in the stipulation of facts, this matter was pending when the Court of Appeals issued its decision in Gillette. And the Department's hearing referee applied the Gillette decision to this matter in a recommendation. And the Commissioner of Revenue adopted that recommendation in issuing a final assessment against Cosmair.

Because the Court of Appeals' decisions in Guardian and Gillette would also effect (sic)numerous taxpayers and businesses which had not previously been subject to the single business tax, the Department had to determine how to apply Guardian and Gillette to these nonpending matters.

For taxpayers affected by the Guardian decision claims for refund would be limited to a four year statute of limitations of claiming a refund. For businesses which had not previously filed single business tax returns, the Department determined that it would also apply Gillette back four years.

As indicated in paragraph 22 of the stipulation of facts, the discovery unit was assigned a project to identify businesses which would be subject to the single business tax under the Gillette nexus standard and to obtain compliance with the Gillette decision for the four years which preceded the Gillette decision.

The first point that must be recognized in this matter is that, pursuant to the principle of stare decisis and MCR 7.215(C), the Gillette nexus standard should be applied to Cosmair. The courts and the Tax Tribunal are already applying Gillette and Guardian to

all opinion matters, and there's no reason not to apply Gillette in this case.

In Gillette the Court of Appeals applied the Due Process, Commerce Clause nexus standard to the tax years 1976 through 1981. And there's no reason not to apply it to Cosmair for the years 1984 through 1988.

Cosmair in fact agrees that the Due Process, Commerce Clause stated it should be applied to it and acknowledges that it is subject to the single business tax under the Due Process, Commerce Clause nexus standard.

However, Cosmair claims that it should not have to pay the single business taxes for the years 1984 through 1988 unless the Department identifies and taxes for those same years all other businesses which would be subject to the single business tax under the Gillette test.

Cosmair's claims of denial of equal protection and uniformity of taxation have no merit. In essence Cosmair is claiming that if a taxing authority does not tax all potential taxpayers, it cannot tax any of the taxpayers.

That standard is not achievable. It does not reflect the law. In the case of Chrysler Rail Transportation Corp. versus Holt, 845 Federal Supplement 463, the U.S. District Court states, I quote:

> "Rather plaintiffs complain that other railroads who may be subject to this tax have not been discovered or have been discovered and have not been taxed."

In concluding that there was no illegal discrimination the District Court stated:

> "The simple fact that the plaintiffs in this case have been found subject to the tax, while others who may be subject have not been discovered, does not make this tax discriminatory."

The first requirement for a claim and a denial of equal protection in uniformity of taxation is that the business must be similarly situated. In this case Cosmair was not similarly situated to unknown, unregistered, nonfiling businesses.

First of all, based upon its activities in Michigan, Cosmair would have been pursued by the Department under any nexus standard. In two letters and in an audit, both which are in the record, the Department determined that Cosmair was subject to the SBT under the higher nexus standard imposed by Public Law 86-272.

Secondly, Cosmair was in the class of pending matters when the Gillette decision was issued.

In contrast, the Department had no pending SBT matters for the unknown, unregistered, and nonfiling businesses. The only way that they were identified was pursuant to the project undertaken by the discovery unit after the Gillette decision was issued.

Other distinguishing factors include that Cosmair filed tax returns for the years in issue, paid single business taxes for some of those years, requested a refund from the Department for taxes paid, was audited by the Department, was issued an intent to assess. And Cosmair specifically requested that an informal conference be adjourned pending a decision in the Gillette case.

None of these factors applied to the unknown, nonfiling, unregistered businesses which were subsequently affected by the Gillette decision. Accordingly, Cosmair fails to establish the first criteria for a claim of denial of equal protection. Cosmair was not similarly situated with the other unknown, unregistered, and nonfiling businesses.

The test for equal protection and uniformity of taxation is a rational basis test. The Department had a rational basis for applying the Gillette decision to Cosmair for the years 1984

through 1988 and applying Gillette to previously unknown and unregistgered businesses only back to the year 1989.

The Department did have a rational basis for applying Gillette to Cosmair. The general rule is that appellate decisions are applied retroactively to all pending matters. As indicated previously, the courts and the Tax Tribunal have already applied Gillette to pending matters. And there is no reason for the Department not to do so in this case.

The second question is whether the Department had a rational basis for applying Gillette to previously unknown, unregistered, and nonfiling business for only four years retroactively to 1989.

It should be emphasized that the rational basis test does not mean that the Department has to make the best decision, nor does it mean that the Department has to make the decision that the Court would make, nor does the Department have to make the decision that it would make if it had unlimited resources. The rational basis test only means that the decision made has a rational basis.

The Department's decision to limit its attempt to obtain compliance for the Gillette decision to four years for previously unregistered and nonfiling businesses did have a rational basis.

As the Department reiterated throughout its responses to Cosmair's discovery requests, the Department believed that no potential SBT taxpayer could reasonably expect that a deficiency would not be issued within the four year statute of limitations.

Beyond the four year statute of limitations, however, the Department believed that several other factors would make an assessment problematical, including those due process limitations of McKesson Corporation, the absence of records, the nonfiler's reliance upon the Department's bulletins, and the Department's limited resources.

Additionally, the four year period was consistent with the four year statute of limitations that would apply to refund requests based upon the Guardian case.

In regards to the Department's limited resources, the Department's supplemental response to Interrogatory No. 25 of plaintiff's interrogatories indicated the following:

That there are more than 295,000 businesses registered for single business tax, one in 340,000 registered for sales tax, and more than four million individual taxpayers.

The Revenue Division of the Department of Treasury has only 1,084 employees, including 260 auditors.

By sheer number the Department does not have sufficient personnel to audit each account, not to mention potential taxpayers.

Because the Department has a finite number of employees, decisions must be made as to the best utilization of those employees to administer and enforce all taxes which fall under the purview of the Commissioner of Revenue.

In regards to the single business tax in the Gillette decision, it was determined, in view of the various factors, that the employees and the discovery unit would undertake a project to obtain compliance with the Gillette decision for the years 1989 and forward for those businesses that were not registered for single business tax or which were filing state withholding tax returns for the years 1991, '92, and '93.

The Department does not have sufficient staffing or auditors to follow up a mailing to 2,000 potential taxpayers to adequately pursue any potential SBT liability for the years prior to 1989.

State agencies have discretion on how to best utilize their limited resources. Lawyers Insurance versus Chicago Insurance, 161 Mich App 183, the Court of Appeals stated, I quote:

> "Having reviewed the record, we find that the decision to charge respondents with violating insurance laws was not based upon a suspect classification and was not a decision by the Commissioner to prosecute respondents to the exclusion of others engaged in the same conduct. Instead, the Commissioner's decision was based upon the Insurance Bureau's conclusion that, given its limited resources, it should prosecute the agencys [sic] which controlled the most businesses in the Detroit metropolitan area."

In summary, the Department did have a rational basis for limiting the retroactive application of Gillette to four years for the nonpending matters.

The final point which should be addressed is the Armco decision. The Armco decision does not support Cosmair's position. The class of taxpayers in Armco was not all franchise fee taxpayers which had been illegally audited, but only those franchise fee taxpayers which had timely appealed pursuant to the statutory methods for contesting the franchise fee.

In Armco the legislature had attempted to limit retroactive application of two Michigan Supreme Court decisions to only those taxpayers which had not paid the tax. The Michigan Supreme Court concluded, however, that the legislature could not restrict the retroactive application of the previous decisions to only certain methods of appeal, and that the prior decisions applied to all pending matters.

The Armco decision does not stand for the proposition that an appellate decision must be applied retroactively to all taxpayers or potential taxpayers equally for the same years, as petitioner claims. Instead, Armco holds that appellate decisions should be applied retroactively to all pending cases equally, regardless of the method of appeal taken.

Mr. McKim has stated that the principles of equal protection and uniformity take precedent over all other statutes and constitutional provisions. That simply is not the case.

In Armco the Michigan Supreme Court specifically recognized that -- that the two prior decisions could not be applied to cases where the statute of limitations had already run. In that case the statute of limitations controlled over principles of equal protection and uniformity.

If there are any questions, I would be more than glad to respond to those.

THE COURT: Thank you. Mr. McKim, please.

MR. McKIM: Thank you, your Honor. Very briefly and by way of reply, the constant reference to Cosmair having a pending appeal. When the Department favored the other 3,000 at the end of 1993, Cosmair had nothing pending. It had filed nothing.

The Department had investigated Cosmair. It hadn't issued its assessment against Cosmair yet. There was no pending appeal by Cosmair, only a pending investigation of Cosmair by the Department.

More importantly, the time factor, your Honor, is critical. It doesn't really matter what existed one way or the other when Gillette was handed down in 1993.

This Court must direct its attention, we respectfully submit, to what existed when the Department determined that it wanted to assess Cosmair in January of 1995. Those are the facts that determine whether it acted discriminatorily or not, whether it had knowledge, and what it had knowledge of when it assessed Cosmair.

It didn't have to assess it. When it decided to do so, in January of 1995, that is when we take a snapshot to see what the facts were from the Department's point of view.

As I pointed out, it knew about and indeed received returns from hundreds and hundreds of other taxpayers that it favored. Yet it then, with that knowledge in mind, persisted in discriminating against Cosmair. It's not what happened when Gillette was decided, but when the Department assessed Cosmair, in terms of facts which are critical.

Lastly in terms of rebuttal, we are not arguing, as the Department suggests, that the Department must go after every potential taxpayer and treat them all equally with us.

We are arguing that when the Department knows about, has corresponded with, indeed told others that they are responsible for the tax, it must treat those known taxpayers the same as us or, conversely, us the same as them. Known taxpayers.

Sunday Lake Iron your Honor, is the controlling case. The Department in its brief cites to Sunday Lake Iron as support for its argument that limited time and resources will permit administrative discrimination. But the Sunday Lake Iron case found no purpose or design to discriminate and, therefore, no intentional discrimination.

I would call the Court's attention to the last paragraph. Now, I'll not read it all, but just a part from the Sunday Lake Iron case. There the Court said, and I quote in part:

> "When plaintiff in error first challenged the values placed upon the property of others no adequate time remained for detailed consideration nor was there sufficient evidence before the board to justify immediate and general re-evaluations." This is the important part. "The very next year a diligent and, so far as it appears, successful effort was made to rectify any inequality."

Then they said the judgment of the court was affirmed.

In this case it was the other way around. The inequality was created a year and a half before the assessment against us. And there has been no effort to rectify it. Sunday Lake Iron speaks the wrong way for the Department. The Department cannot seek the shelter of Sunday Lake Iron.

I would reiterate, your Honor -- I think my time must be nearly finished -- that we do not seek for the Department to treat 3,000 known taxpayers equally with Cosmair by assessing them with the years '84 through '88 in the way they did Cosmair under the new test. It's too late for that. The Department has committed itself. Hundreds of taxpayers have filed returns, and 30 million dollars has been collected.

All we ask, your Honor, is that Cosmair be given the same treatment the Department gave the others. And that means for the years 1984 through 1988 the new tests should not be applied to Cosmair. And they are the only tests which the Department has attempted to apply.

Thank you very much, your Honor.

THE COURT: Thank you. This matter is before the Court on cross-motions for summary disposition pursuant to MCR 2.116(C)(10) based upon stipulated facts. A motion under this subrule test whether there is a question of material fact for trial.

The Court must inquire whether the type of record which may be developed, giving the benefit of reasonable doubt to the opposing party, would leave open an issue upon which reasonable minds may differ. The Court examines the facts in the light most favorable to the nonmoving party.

The moving party must support the motion with affidavits or other documentary evidence. The opposing party may not rest upon mere allegations or denials of the pleadings, but must, by affidavit or other documentary evidence, set forth specific facts showing that there is a material or genuine issue for trial.

In this matter, following the decision in Gillette Company versus The Department of Treasury, 198 Michigan Appeals 303, The Department of Treasury adopted the position that the Due Process, Commerce Clause standard would apply to all single business tax taxpayers, beginning with the 1989 tax year.

Treasury notified 2,790 potential single business taxpayer of its position and requested they file appropriate returns. 727 of those notified voluntarily complied with the request. Treasury apparently took little or no action with regard to the other 2,063 potential taxpayers who failed to respond in regard to the tax years prior to 1989. The Department determined that it would pursue single business taxes from only those taxpayers who would not have been protected under PL -- or the PL 272 standard.

Cosmair argues that Treasury must refund the taxes it paid for the years 1984 through 1988, because Treasury's application of the more protective PL 272 standard to other similarly situated taxpayers, and Treasury's failure to pursue the potential taxpayers for the years prior to 1989, violated Cosmair's right to equal protection and uniform application of the tax laws.

Cosmair argues that this action is controlled by the Supreme Court's decision in Armco Steel Corporation versus The Department of Treasury, 419 Michigan 582, 1984. The facts in that case are as follows:

Treasury assessed corporate franchise fee deficiencies for various tax years prior to 1975. The Supreme Court, however, later determined that the assessments were void because Treasury had no authority to conduct field audits of the corporation's books or to recompute the franchise fee, even if it later obtained more accurate information regarding the corporation's liability.

In response to the Supreme Court's decision, the legislature enacted legislation which authorized Treasury to perform such functions. The Court of Appeals determined, however, that this new legislation could only be applied prospectively. Treasury then canceled or rescinded those deficiencies which remained unpaid,

but refused to grant refunds to those corporate taxpayers who had paid assessments and later sought repayment.

The Court of Appeals in two cases ruled that Treasury must refund those assessments that the plaintiffs paid following unauthorized audits and recomputations.

The legislature then enacted 1978 PA 392 which was intended to retroactively validate Treasury's audits and recomputations. Treasury, however, continued to deny assessment refunds while canceling or rescinding unpaid deficiencies.

Armco and another corporation, which had paid assessments and had sought refunds, then filed suit, alleging that Act 392, as applied to them, violated the Equal Protection Clauses of the United States and Michigan Constitutions and the Uniformity Clause of the Michigan Constitution.

The Court of Appeals held that Act 392, as applied to the plaintiffs, violated equal protection. The Michigan Supreme Court quoted The United States Supreme Court's decision in Allied Stores of Ohio versus Bowers, 358 U S. 522, 1959, for the proposition that:

> "There is a point beyond which the state cannot go without violating the Equal Protection Clause. The state must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule has often been stated to be that the classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." Armco at 591.

Now, the Court went on to state:

> "Similarly, under the Uniformity of Taxation Clause of the Michigan Constitution, the controlling principle is one of equal treatment of similarly situated taxpayers. As a practical

matter, in cases involving taxing statutes, there is no discernible difference between the Equal Protection and Uniformity of Taxation Clauses. Some rational basis for disputed classification must be shown to exist ." Armco at 592.

In affirming the Court of Appeals' decision, the Court stated:

"The division has failed to suggest any persuasive, rational basis justifying its disparate treatment of those corporate taxpayers who paid their deficiency assessments following unauthorized audits and recomputations and those who did not." From 593.

"Each of these taxpayers, however, was subject to the division's power, or lack thereof, under the Franchise Fee Act. The only distinction existing between them is that one group paid their deficiencies while the other group did not.

This is not a natural distinguishing characteristic which bears a reasonable relationship to the object of the classification. The distinction has become important only because of the division's disparate treatment of these two groups.

Although not determinative of our decision in this matter, case law in other jurisdictions has held it unconstitutional to benefit or prefer those who did not pay their taxes promptly over those who do. That, of course, is the precise effect of the fashion in which Act 392 has been applied to the plaintiffs in these cases.

While it is undisputed, therefore, that the legislature can validate retroactively anything that it could have originally authorized, it is not empowered to validate the division's persistent

> discrimination between two groups of taxpayers who are in reality one class." At pages 595 and 96.

The Court of Appeals in Molter versus Department of Treasury, 193 Michigan Appeals 421, 1992, stated that:

> "The equal protection guarantee requires that persons under similar circumstances be treated alike. It does not require that persons under different circumstances be treated the same."

The Court is of the opinion that the present situation is not controlled by the Armco decision because, unlike the taxpayers in that case, Cosmair is not similarly situated with those taxpayers Treasury will not pursue for taxes prior to 1989.

In Armco Treasury had already assessed the similarly situated taxpayers for deficiencies regarding franchise fees. The only distinction between the two groups was that one had paid the assessment and requested refunds, while the other had refused to pay the assessment.

In the present case Cosmair has paid, albeit under protest, taxes for the relevant years. Cosmair sought administrative review of its tax liability, which was held in abeyance pending the outcome of the Gillette case. Thus Cosmair has known, since at least 1985, of Treasury's position that it is liable for taxes for the years 1984 through 1988.

To the contrary, the group which Cosmair claims is similarly situated are merely potential taxpayers, who have not filed returns or been assessed tax deficiencies.

Thus, the Court is of the opinion that, in light of these distinct situations, Cosmair is not similarly situated with those potential taxpayers.

Cosmair argues, however, that Treasury's refusal to actively seek out those potential taxpayers constitutes disparate

treatment. The heart of this issue is whether Treasury is required to actively seek out all taxpayers who may be subject to the single business tax. Although, as I understand, that's not precisely the argument today, I think generally the concept applied.

Cosmair has presented no authority to support this proposition. Moreover, the court is cognizant of the Treasury's limited resources which make such an effort a practical impossibility. There are also due process considerations with regard to those potential taxpayers which are not an issue with Cosmair.

Therefore, the Court is of the opinion that Treasury has no duty to pursue all potential taxpayers.

Cosmair also argues that Treasury may not apply the more protective 272 standard to other potential taxpayers when it has applied the Due Process, Commerce Clause standard to Cosmair.

Treasury argues that it is not applying that standard to determine whether the necessary nexus exists for tax liability, but instead is merely applying it as a threshold for determining whether to pursue the potential taxpayers in the first place.

Based on the Court of Appeals' decision in Gillette, Treasury is required to determine said taxpayers' liability based on the Due Process, Commerce Clause test.

However, if said taxpayers met the more restrictive nexus standard under Act 272, they would also necessarily meet the more liberal standard under the Due Process and Commerce Clauses.

Thus Treasury's use of the 272 standards for determining the parameters of its compliance efforts is not in contravention of the Gillette decision nor does it treat Cosmair differently than other single business tax taxpayers.

The Court concludes that Treasury's approach to enforcing the single business tax, including its retroactive application of the

Due Process, Commerce Clause standard, has not violated Cosmair's right to equal protection and uniformity of the tax laws.

The Court is of the opinion the plaintiff's Motion for Summary Disposition should be denied, and the defendant's granted. And I will approve an order accordingly. And I thank you.

MR. GOMOLL: Thank you, your Honor.

(At 2:56 p.m., approximately, court recessed).

* * *

STATE OF MICHIGAN)
)
COUNTY OF INGHAM)

I certify that this transcript, consisting of 38 pages, is a complete, true, and accurate transcript in the matter of *Cosmair, Inc.* versus *Revenue Division of the Department of Treasury of the State of Mihcigan and Department of Treasury of the State of Michgan*, Docket No. 95-15815-CM, held on Friday, August 16, 1996.

Dated: _____ _____

Jody A. Larsen, RPR, CSR 4224 (517) 483-6402
124 W. Michigan Ave., City Hall, Second Floor,
Lansing, MI 48933

APPENDIX F

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

COSMAIR, INC.,

Plaintiff, Case No. 95-15815-CM

v Hon. Michael G. Harrison

REVENUE DIVISION OF THE DEPARTMENT OF TREASURY OF THE STATE OF MICHIGAN, and DEPARTMENT OF TREASURY OF THE STATE OF MICHIGAN,

Defendant.

_____/

Samuel J. McKim III (P17480)
Joanne B. Faycurry (P40993)
MILLER, CANFIELD, PADDOCK & STONE
Attorneys for Plaintiff

_____

Terry P. Gomoll (P14148)
Assistant Attorney General
Attorney for Defendant

_____/

ORDER GRANTING SUMMARY DISPOSITION

At a session of said Court, held in the Ingham County Circuit Courtroom, Second Floor, City Hall, City of Lansing, Michigan on the 10th day of September, 1996.

PRESENT: HONORABLE MICHAEL G. HARRISON
Judge of the Court of Claims

This matter having come on for hearing on Friday, August 16, 1996 on Plaintiff's Motion for Summary Disposition and Defendant's Cross-Motion for Summary Disposition of the First Amended Complaint and the Court having read the pleadings filed by the parties and having heard the oral argument of counsel at hearing, and after oral argument the Court having determined that Plaintiff's Motion for Summary Disposition should be denied and that Defendant's Cross-Motion for Summary Disposition should be granted, and the Court being otherwise duly advised as in the premises;

NOW, THEREFORE, IT IS HEREBY ORDERED that pursuant to the reasons set forth by the Court on the record at the hearing held on August 16, 1996, Defendant's Cross Motion for Summary Disposition of the First Amended Complaint is GRANTED and this case is dismissed with prejudice.

/s/ MICHAEL G. HARRISON
Honorable Michael G. Harrison
Judge of the Court of Claims

9504076/ORDER

APPENDIX G

Constitution of the State of Michigan of 1963

ARTICLE IX. FINANCE AND TAXATION

MCL Const. 1963, Art. 9, § 1 (1992)

1. Taxes for state expenses.

Sec. 1. The legislature shall impose taxes sufficient with other resources to pay the expenses of state government.

2. Power of taxation, relinquishment.

Sec. 2. The power of taxation shall never be surrendered, suspended or contracted away.

3. Property taxation; uniformity, assessments, classes.

Sec. 3. The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law except for taxes levied for school operating purposes. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not, after January 1, 1966, exceed 50 percent; and for a system of equalization of assessments. For taxes levied in 1995 and each year thereafter, the legislature shall provide that the taxable value of each parcel of property adjusted for additions and losses, shall not increase each year by more than the increase in the immediately preceding year in the general price level, as defined in section 33 of this article, or 5 percent, whichever is less until ownership of the parcel of property is transferred. When ownership of the parcel of property is transferred as defined by law, the parcel shall be assessed at the applicable proportion of current true cash value. The legislature

may provide for alternative means of taxation of designated real and tangible personal property in lieu of general ad valorem taxation. Every tax other than the general ad valorem property tax shall be uniform upon the class or classes on which it operates. A law that increases the statutory limits in effect as of February 1, 1994 on the maximum amount of ad valorem property taxes that may believed for school district operating purposes requires the approval of ¾ of the members elected to and serving in the Senate and in the House of Representatives.

Constitution of the State of Michigan of 1963

ARTICLE I. DECLARATION OF RIGHTS

MCL Const. 1963, Art. 1, § 2 (1992)

2. **Equal protection; discrimination.**

Sec. 2. No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

APPENDIX H

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 205. TAXATION
REVENUE DIVISION OF DEPARTMENT OF TREASURY

205.1 Revenue division of department of treasury; creation, purposes; references to department of revenue, meaning

Sec. 1. A tax collection agency is created, to be known as the revenue division of the department of treasury of the state, for the following purposes:

(a) Coordinated collection of such state taxes, assessments, licenses, fees and other moneys as may be designated by law, either herein or hereafter.

(b) Specialized service for tax enforcement, through establish-ment and maintenance of uniformity in definition, regulation, return and payment.

(c) Avoidance of duplication in state facilities for tax collections that involve seasonal or occasional increases of staff, duplication of audits and wasteful travel expenses.

(d) Safeguarding tax and other collections wherever received until duly deposited in the state treasury.

(e) Providing an advisory service on fiscal status, processes and needs of state government, including periodic reports on payments, receipts and debts.

(f) Development of a state revenue enforcement service by means of a staff that is permanent, qualified by training and experience, protected by merit system procedure, and so organized as to serve the public with efficiency, economy, consistency and equity.

Any reference to the department of revenue in this act or any other act shall mean the revenue division of the department of treasury.

MICHIGAN COMPILED LAWS ANNOTATED CHAPTER 205. TAXATION
REVENUE DIVISION OF DEPARTMENT OF TREASURY

Current through P.A. 1999, No. 25 of the 1999 Regular Session, 90th Legislature

205.27a Selling or quitting business; returns; tax liability; penalties and interest; statute of limitations; personal liability of officers; application, schedule of payment

Sec. 27a. (1) If a person liable for a tax administered under this act sells out his or her business or its stock of goods or quits the business, the person shall make a final return within 15 days after the date of selling or quitting the business. The purchaser or succeeding purchasers, if any, who purchase a going or closed business or its stock of goods shall escrow sufficient money to cover the amount of taxes, interest, and penalties as may be due and unpaid until the former owner produces a receipt from the commissioner or the commissioner's designated representative showing that the taxes due are paid, or a certificate stating that taxes are not due. Upon the owner's written waiver of confidentiality, the commissioner may release to a purchaser a business' known tax liability for the purposes of establishing an escrow account for the payment of taxes. If the purchaser or succeeding purchasers of a business or its stock of goods fail to comply with the escrow requirements of this subsection, the purchaser is personally liable for the payment of the taxes, interest, and penalties accrued and unpaid by the business of the former owner. The purchaser's or succeeding purchaser's personal liability is limited to the fair market value of the business less the amount of any proceeds that are applied to balances due on secured interests that are superior to the lien provided for in section 29-1. [FN1]

(2) A deficiency, interest, or penalty shall not be assessed after the expiration of 4 years after the date set for the filing of the required return or after the date the return was filed, whichever is later. The taxpayer shall not claim a refund of any amount paid to the department after the expiration of 4 years after the date set

for the filing of the original return. A person who has failed to file a return is liable for all taxes due for the entire period for which the person would be subject to the taxes. If a person subject to tax fraudulently conceals any liability for the tax or a part of the tax, or fails to notify the department of any alteration in or modification of federal taxability, the department, within 2 years after discovery of the fraud or the failure to notify, shall assess the tax with penalties and interest as provided by this act, computed from the date on which the tax liability originally accrued. The tax, penalties, and interest are due and payable after notice and hearing as provided by this act.

(3) The running of the statute of limitations is suspended for the following:

(a) The period pending a final determination of tax, including audit, conference, hearing, and litigation of liability for federal income tax or a tax administered by the department and for 1 year after that period.

(b) The period for which the taxpayer and the commissioner have consented to in writing that the period be extended.

(4) The running of the statute of limitations is suspended only as to those items that were the subject of the audit, conference, hearing, or litigation for federal income tax or a tax administered by the department.

(5) If a corporation liable for taxes administered under this act fails for any reason to file the required returns or to pay the tax due, any of its officers having control or supervision of, or charged with the responsibility for, making the returns or payments is personally liable for the failure. The signature of any corporate officers on returns or negotiable instruments submitted in payment of taxes is prima facie evidence of their responsibility for making the returns and payments. The dissolution of a corporation does not discharge an officer's liability for a prior failure of the corporation to make a return or remit the tax due. The sum due for a liability may be assessed and collected under the related sections of this act.

(6) Notwithstanding the provisions of subsection (2), a claim for refund based upon the validity of a tax law based on the laws or constitution of the United States or the state constitution of 1963 shall not be paid unless the claim is filed within 90 days after the date set for filing a return.

(7) Subsection (6) does not apply to a claim for the refund of a tax paid for the 1984 tax year or a tax year after the 1984 tax year on income received as retirement or pension benefits from a public retirement system of the United States government if the claimant waives any claim for the refund of such a tax paid for a tax year before 1984. Claims for refunds to which this subsection applies shall be paid in accordance with the following schedule:

Refunds for tax year:	Payable on or after:
1988 and 1987	July 1, 1990
1986	July 1, 1991
1985	July 1, 1992
1984	July 1, 1993

[FN1] Section 205.29(1).

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 208. SINGLE BUSINESS TAX ACT
SINGLE BUSINESS TAX ACT
CHAPTER 4. TAX RETURNS AND PAYMENTS

Current through P.A. 1999, No. 25 of the 1999 Regular Session, 90th Legislature

208.73. Annual or final returns

Sec. 73. (1) An annual or final return shall be filed with the department in the form and content prescribed by the department by the last day of the fourth month after the end of the taxpayer's tax year. Any final liability shall be remitted with this return. A person whose apportioned or allocated gross receipts plus the adjustments provided in section 23b(a), (b), and (c) [FN1] are less than the following amount for the appropriate year need not file a return or pay the tax provided under this act:

(a) $40,000.00 for tax years beginning before January 1, 1991.

(b) $60,000.00 for tax years beginning after December 31, 1990 and before January 1, 1992.

(c) $100,000.00 for tax years beginning after December 31, 1991 and before January 1, 1994.

(d) $137,500.00 for tax years beginning after December 31, 1993 and before January 1, 1995.

(e) $250,000.00 for tax years beginning after December 31, 1994.

(2) For a person whose apportioned or allocated gross receipts plus the adjustments provided in section 23b(a), (b), and (c), are for a tax year less than 12 months, the amount in subsection (1) shall be multiplied by a fraction, the numerator of which is the number of months in the tax year and the denominator of which is 12.

(3) The commissioner upon application of the taxpayer and for good cause shown may extend the date for filing the annual return. Interest at the rate of 9% per annum shall be added to the amount of the tax unpaid for the period of the extension. The commissioner shall require a tentative return and payment of an estimated tax.

(4) If a taxpayer is granted an extension of time within which to file the federal income tax return for any taxable year, the filing of a copy of the request for extension together with a tentative return and payment of an estimated tax with the commissioner by the due date provided in subsection (1) shall automatically extend the due date for the filing of a final return under this act for an equivalent period plus 60 days. Interest at the rate of 9% per annum shall be added to the amount of the tax unpaid for the period of the extension.

(5) For tax years that end after July 6, 1994, an affiliated group as defined in this act, a controlled group of corporations as defined in section 1563 of the internal revenue code and further described in 26 C.F.R. 1.414(b)-1 and 1.414(c)-1 to 1.414(c)-5, or an entity under common control as defined in the internal revenue code shall consolidate the gross receipts of the members of the affiliated group, member corporations of the controlled group, or entities under common control that have apportioned or allocated gross receipts, plus the adjustments provided in section 23b(a), (b), and (c), of $100,000.00 or more to determine if the group or entity shall pay a tax or file a return as provided under subsection (1). An individual member of an affiliated group or controlled group of corporations or an entity under common control is not required to file a return or pay the tax under this act if that member or entity has apportioned or allocated gross receipts, plus the adjustments provided in section 23b(a), (b) and (c), of less than $100,000.00.

[FN1] Section 208.23b(a), 208.23b(b), 208.23b(c).

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 205. TAXATION
REVENUE DIVISION OF DEPARTMENT OF TREASURY

Current through P.A. 1999, No. 25 of the 1999 Regular Session, 90th Legislature

205.24 Failure to file return or pay tax; assessment and notice; income tax withholding deposits; penalties

Sec 24. (1) If a taxpayer fails or refuses to file a return or pay a tax administered under this act within the time specified, the department, as soon as possible, shall assess the tax against the taxpayer and notify the taxpayer of the amount of the tax. A liability for a tax administered under this act is subject to the interest and penalties prescribed in subsections (2) to (5).

(2) Except as provided in subsections (3) and (6), if a taxpayer fails or refuses to file a return or pay a tax within the time specified, a penalty of $10.00 or 5% of the tax, whichever is greater, shall be if the failure is for not more than 1 month, with an additional 5% penalty for each additional month or fraction of a month during which the failure continues or the tax and penalty is not paid, to a maximum of 50%. In addition to the penalty, interest at the rate provided in section 23 [FN1] for deficiencies in tax payments shall be added on the tax from the time the tax was due, until paid. After June 30, 1994, the penalty prescribed by this subsection shall not be imposed until the department submits for public hearing pursuant to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws, a rule defining what constitutes reasonable cause for waiver of the penalty under subsection (4), which definition shall include illustrative examples.

(3) If a person is required to remit tax due pursuant to section 19(2) [FN2] and fails or refuses to pay the tax within the time specified, a penalty of 0.167% of the tax shall be added for each day during which the failure continues or the tax and penalty are not paid, to a maximum of 50% of the tax. For reporting periods

beginning after August 31, 1991 and before November 1, 1991, the commissioner shall not impose the penalty under this subsection if the tax is remitted within 2 banking days of the date specified and the taxpayer demonstrates that the taxpayer's account at their financial institution was charged for the tax owed on or before the date the remittance was due.

(4) If a return is filed or remittance is paid after the time specified and it is shown to the satisfaction of the department that the failure was due to reasonable cause and not to willful neglect, the commissioner or an authorized representative of the commissioner shall waive the penalty prescribed by subsection (2).

(5) For failure or refusal to file an information return or other informational report required by a tax statute, within the time specified, a penalty of $10.00 per day for each day for each separate failure or refusal may be added. The total penalty for each separate failure or refusal shall not exceed $400.00.

(6) If a taxpayer fails to pay an estimated tax payment as may be required by the income tax act of 1967, Act No. 281 of the Public Acts of 1967, being sections 206.1 to 206.532 of the Michigan Compiled Laws, a penalty shall not be imposed if the taxpayer was not required to make estimated tax payments in the taxpayer's immediately preceding tax year.

[FN1] Section 205.23.
[FN2] Section 205.19(2).

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 205. TAXATION
REVENUE DIVISION OF DEPARTMENT OF TREASURY

Current through P.A. 1999, No. 25 of the 1999 Regular Session, 90th Legislature

205.28 Conditions applicable to taxes; penalties

Sec. 28. (1) The following conditions apply to all taxes administered under this act unless otherwise provided for in the specific tax statute:

(a) Notice, if required, shall be given either by personal service or by certified mail addressed to the last known address of the taxpayer. Service upon the commissioner may be made in the same manner.

(b) An injunction shall not issue to stay proceedings for the assessment and collection of a tax.

(c) In addition to the mode of collection provided in this act, the department may institute an action at law in any county in which the taxpayer resides or transacts business.

(d) The commissioner may request in writing information or records in the possession of any other department, institution, or agency of state government for the performance of duties under this act. Departments, institutions, or agencies of state government shall furnish the information and records upon receipt of the commissioner's request. Upon request of the commissioner, any department, institution, or agency of state government shall hold a hearing under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, to consider withholding a license or permit of a person for nonpayment of taxes or accounts collected under this act.

(e) Except as otherwise provided in section 30c, [FN1] the commissioner or an employee of the department shall not compromise or reduce in any manner the taxes due to or claimed

by the state or unpaid accounts or amounts due to any department, institution, or agency of state government. This subdivision does not prevent a compromise of interest or penalties, or both.

(f) Except as otherwise provided in this subdivision, an employee, authorized representative, or former employee or authorized representative of the department or anyone connected with the department shall not divulge any facts or information obtained in connection with the administration of a tax or information or parameters that would enable a person to ascertain the audit selection or processing criteria of the department for a tax administered by the department. A person may disclose information described in this subdivision if the disclosure is required for the proper administration of a tax law administered under this act, pursuant to a judicial order sought by an agency charged with the duty of enforcing or investigating support obligations pursuant to an order of a court in a domestic relations matter as that term is defined in section 31 of the friend of the court act, 1982 PA 294, MCL 552.531, or pursuant to a judicial order sought by an agency of the federal, state, or local government charged with the responsibility for the administration or enforcement of criminal law for purposes of investigating or prosecuting criminal matters or for federal or state grand jury proceedings or a judicial order if the taxpayer's liability for a tax administered under this act is to be adjudicated by the court that issued the judicial order. However, the commissioner or a person designated by the commissioner may divulge information set forth or disclosed in a return or report or by an investigation or audit to any department, institution, or agency of state government upon receipt of a written request from a head of the department, institution, or agency of state government if it is required for the effective administration or enforcement of the laws of this state, to a proper officer of the United States department of treasury, and to a proper officer of another state reciprocating in this privilege. The commissioner may enter into reciprocal agreements with other departments of state government, the United States department of treasury, local governmental units within this state, or taxing officials of other states for the enforcement, collection, and exchange of data after ascertaining that any information provided

will be subject to confidentiality restrictions substantially the same as the provisions of this act.

(2) A person who violates subsection (1)(e) or (1)(f) is guilty of a felony, punishable by a fine of not than $5,000.00, or imprisonment for not more than 5 years, or both, together with the costs of prosecution. In addition, if the offense is committed by an employee of this state, the person shall be dismissed from office or discharged from employment upon conviction.

(3) A person liable for any tax administered under this act shall keep accurate and complete records necessary for the proper determination of tax liability as required by law or rule of the department.

[FN1] Section 205.30c.

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 205. TAXATION
REVENUE DIVISION OF DEPARTMENT OF TREASURY

Current through P.A. 1999, No. 60 of the Regular Session, 90th Legislature

205.22 Appeals

Sec. 22 (1) A taxpayer aggrieved by an assessment, decision, or order of the department may appeal the contested portion of the assessment, decision, or order to the tribunal within 35 days, or to the court of claims within 90 days after the assessment, decision, or order. The uncontested portion of an assessment, order, or decision shall be paid as a prerequisite to appeal. However, an action shall be commenced in the court of claims within 6 months after payment of the tax or an adverse determination of the taxpayer's claim for refund, whichever is later, if the payment of the tax or adverse determination of the claim for refund occurred under the single business tax act, Act No. 228 of the Public Acts of 1975, being sections 208.1 to 208.145 of the Michigan Compiled Laws, and before May 1, 1986.

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 205. TAXATION
REVENUE DIVISION OF DEPARTMENT OF TREASURY

Current through P.A. 1999, No. 25 of the 1999 Regular Session, 90th Legislature

205.13. Administration and enforcement of laws transferred to the department of treasury

Sec. 13. The department of treasury shall administer and enforce the following laws and shall succeed to and is vested with all of the powers, duties, functions, responsibilities, and jurisdiction now or hereafter conferred upon the following:

(a) State board of tax administration, by the general sales tax act, Act No. 167 of the Public Acts of 1933, being sections 205.51 to 205.78 of the Michigan Compiled Laws, and by the use tax act, Act No. 94 of the Public Acts of 1937, being sections 205.91 to 205.111 of the Michigan Compiled Laws.

(b) Auditor general, by Act No. 282 of the Public Acts of 1905, being sections 207.1 to 207.21 of the Michigan Compiled Laws, and by the Michigan estate tax act, Act No. 188 of the Public Acts of 1899, being sections 205.201 to 205.256 of the Michigan Compiled Laws.

(c) State tax commission, by Act No. 48 of the Public Acts of 1929, being sections 205.301 to 205.317 of the Michigan Compiled Laws, and by Act No. 301 of the Public Acts of 1939, being sections 205.131 to 205.147 of the Michigan Compiled Laws.

(d) State tax commission, by section 61524 of part 615 (supervisor of wells) of the natural resources and environmental protection act, Act No. 451 of the Public Acts of 1994, being section 324.61524 of the Michigan Compiled Laws.

(e) The commission shall also succeed to and is vested with all of the powers, duties, functions, responsibilities, and jurisdiction of the corporation and securities commission over the enforcement,

investigation, and collection of past due and delinquent corporate privilege and franchise fees and license fees of any nature. The corporation and securities commission shall, whenever requested by the department, report to the department the names of all delinquent corporations and delinquent licensees, and the department shall be charged with the collection of all fees and licenses covered in the reports.

(f) The department shall succeed to and is vested with all powers, duties, functions, responsibilities, and jurisdiction of the attorney general over the collection of all past due money and accounts that are owing to the state of Michigan or any department, commission, or institution of this state, vested in the attorney general by Act No. 375 of the Public Acts of 1927, being sections 14.131 to 14.134 of the Michigan Compiled Laws.

(g) For cities that enter into an agreement with the department of treasury pursuant to section 9 of the city income tax act, Act No. 284 of the Public Acts of 1964, being section 141.509 of the Michigan Compiled Laws, the department of treasury is vested with all the powers, duties, functions, responsibilities, and jurisdiction to administer, collect under, and enforce Act No. 284 of the Public Acts of 1964 [FN1] as provided in Act No. 284 of the Public Acts of 1964 and the agreement. The department of treasury shall not charge to or collect from a taxpayer any amount not otherwise authorized by law with the collection of the tax pursuant to an agreement entered into under section 9 of chapter 1 of Act No. 284 of the Public Acts of 1964.

[FN1] Sections 141.501 to 141.787.

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 208. SINGLE BUSINESS TAX ACT
SINGLE BUSINESS TAX ACT
CHAPTER 5. ADMINISTRATION, COLLECTION, AND ENFORCEMENT

Current through P.A. 1999, No. 60 of the 1999 Regular Session, 90th Legislature

208.80 Administration of tax; rules; proceeds

Sec. 80. (1) The tax imposed by this act shall be administered by the revenue commissioner pursuant to Act No. 122 of the Public Acts of 1941, being sections 205.1 to 205.30 of the Michigan Compiled Laws, and this act. In case of conflict between Act. No. 122 of the Public Acts of 1941 and this act, the provisions of this act will apply.

(2) Rules shall be promulgated under this act pursuant to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws.

(3) The department shall prescribe forms for use by taxpayers and shall promulgate rules in conformity with this act for the maintenance by taxpayers of records, books, and accounts, and for the computation of the tax, the manner and time of changing or electing accounting methods and of exercising the various options contained in this act, the making of returns, and the ascertainment, assessment, and collection of the tax imposed under this act.

(4) The tax imposed by this act is in addition to all other taxes for which the taxpayer may be liable. The proceeds derived from the tax shall be credited to the general fund of the state to be allocated and distributed as provided by this act.

(5) The department shall prepare and publish statistics from the records kept to administer the tax imposed by this act, detailing the distribution of tax receipts by type of business, legal form of organization, sources of tax base, timing of tax receipts, and types of deductions. The statistics shall not result in the disclosure of information regarding any specific taxpayer.

APPENDIX I

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

COSMAIR, INC.,

Plaintiff, Case No. 95-15815-CM

v

Hon. Michael G. Harrison

REVENUE DIVISION OF
THE DEPARTMENT OF
TREASURY OF THE STATE OF
MICHIGAN, and DEPARTMENT
OF TREASURY OF THE
STATE OF MICHIGAN,

Defendant.
_____/

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STIPULATION OF FACTS

Plaintiff, Cosmair, Inc., ("Cosmair") and Defendant, the State of Michigan, Department of Treasury, Revenue Division, (the "Department"), through their attorneys, stipulate to the following

facts:

1. Cosmair is a Delaware corporation with its commercial domicile and place of business in Clark, New Jersey.

2. The taxes involved in this case are imposed under the Single Business Tax Act (MCLA 208.1 et seq; MSA 7.558(1), et seq) ("SBT" taxes and the "SBT Act") for the tax years ending on December 31, 1984, 1985, 1986, 1987 and 1988. (The "tax years at issue").

3. Cosmair manufactures and distributes cosmetics and fragrances throughout the United States. It closed its only Michigan facility in March of 1983, but continued selling its products in Michigan during the tax years at issue.

4. That for many years before the tax years at issue, and during all of the tax years at issue, the Department published bulletins (RAB 1980-1 and RAB 89-46, "Jurisdictional Standard") announcing that it would use as a guide in determining jurisdiction to assess taxes under the SBT Act for businesses involved in the sale of tangible personal property the cases decided under PL 86-272 (codified as 15 USC § 381).[1]

5. After closing its Michigan facility in 1983, and for all of the tax years at issue, Cosmair has consistently taken the position that it is not subject to Michigan's jurisdiction to assess SBT taxes under the PL 86-272 test. The Department twice advised Cosmair, on February 16, 1989 and May 29, 1991, that it believed Cosmair was not protected under PL 86-272 from Michigan SBT taxing jurisdiction.

6. Cosmair filed a Michigan SBT return for the year 1983, the year preceding the tax years at issue, and paid SBT taxes

[1] PL 86-272 is federal legislation which prohibits a state from imposing an income tax on persons engaged in interstate commerce if the only activity carried on in the state is "solicitation of orders", with offers to purchase being accepted, and goods sold shipped from, outside Michigan.

for the year 1983.

7. In the year 1984 Cosmair, following internal procedures established for years before 1984, inadvertently paid estimated SBT taxes in the amount of $38,240 and inadvertently paid an additional $16,760 when Cosmair filed a request for extension of the date to file its 1984 SBT tax return. On or about December 13, 1985, Cosmair voluntarily filed a final 1984 SBT return indicating that it was not liable for SBT taxes and was filing its 1984 return to request a refund of the estimated taxes paid during 1984.

8. In the year 1985 Cosmair, following internal procedures established for years before 1984, again inadvertently paid estimated SBT taxes in the amount of $28,000, and paid an additional $48,000 when it filed a request for extension of the date to file its 1985 SBT return. On or about September 11, 1986, Cosmair voluntarily filed a final 1985 SBT return indicating that it was not liable for SBT tax and requested a refund of the SBT taxes paid.

9. For the year 1986 Cosmair, following internal procedures established for years before 1984, again inadvertently paid estimated SBT taxes in the total amount of $36,000. On or about March 9, 1987, Cosmair voluntarily filed a final 1986 SBT return indicating that it was not liable for SBT taxes and requested a refund of the SBT taxes paid.

10. On or about September 11, 1988, Cosmair voluntarily filed a final 1987 SBT return indicating that it was not liable for SBT taxes.

11. On or about September 11, 1989, Cosmair voluntarily filed a final 1988 SBT return indicating that it was not liable for SBT taxes.

12. On December 6, 1988, Mr. Louis Sturniolo, Tax Manager for Cosmair, sent a letter to Mr. David M. Kirvan,

requesting the Department to determine whether Cosmair had SBT jurisdictional nexus in Michigan. On February 2, 1989, Mr. Sturniolo sent a letter to Mr. Kirvan attaching a completed Michigan Business Activity Questionnaire for Cosmair. On February 16, 1989, Mr. Kirvan, Administrator of the Single Business Tax Division for Defendant, sent a letter to Mr. Sturniolo stating that Cosmair's activities in Michigan would create nexus in Michigan. On March 29, 1991, Mr. Sturniolo sent a letter to Mr. Kirvan requesting additional time to submit further information concerning Cosmair's activities in Michigan. On April 19, 1991, Mr. Sturniolo sent a letter to Mr. Kirvan attempting to describe Cosmair's Michigan activities. On May 29, 1991, Mr. Kirvan again sent a letter to Mr. Sturniolo indicating that such Michigan activities were sufficient to establish SBT jurisdictional nexus and that the Department would proceed to audit Cosmair.

13. After Cosmair refused to concede that the Department had jurisdiction to impose the SBT Tax after 1983, the Department audited Cosmair for the years 1984 through 1988. The SBT audit was completed on July 11, 1991 ("the Audit"), and recommended that Cosmair was not within the protection of PL 86-272 and was subject to the Department's jurisdiction to assess SBT taxes for the tax years at issue.

14. On October 8, 1991, the Department issued Intent to Assess No. G014160 against Cosmair for SBT taxes, interest and penalty due for the tax years 1985, 1986, 1987 and 1988 ("the Intent to Assess"). The Intent to Assess was issued for SBT tax due in the amount of $227,602, penalty in the amount of $113,801 and interest in the amount of $80,784.84, for a total amount of $422,187.84; it did not reflect recognition of Cosmair's requests for refunds, which were deemed to have been denied.

15. On October 21, 1991, Mr. Louis Sturniolo sent a letter to Mr. Gary Sandborn, Administrator of Hearings and Tax Research for Defendant. The letter requested an informal conference concerning the Bill for Taxes Due (Intent to Assess No. G104160) and suggested that the conference be postponed until the

decision in the matter The Gillette Company v Department of Treasury, then pending in the Michigan Court of Appeals, was issued.

16. The Gillette case involved the Department's assessment of SBT tax jurisdiction under the said PL 86-272 jurisdictional standard for tax years 1976 through 1981, which jurisdiction was contested by Gillette in the Michigan Tax Tribunal, which, after an extended trial, on February 13, 1989, rendered a decision finding that SBT jurisdiction to tax Gillette existed. Gillette appealed to the Michigan Court of Appeals, where the parties, on briefs and oral argument, submitted the case under the PL 86-272 jurisdictional test then being applied by the Department.

17. On March 1, 1993, the Michigan Court of Appeals issued its decision in the case of The Gillette Company v Department of Treasury, 198 Mich App 303; 497 NW2d 595 (1993), lv den 445 Mich 860 (1994); cert den 130 L Ed 2d 673 (1995). In Gillette, the Court of Appeals held that PL 86-272 was inapplicable to the SBT Act jurisdiction issue and that the proper test for determining SBT tax jurisdiction was the Due Process/Commerce Clause tests then recently enunciated by the U.S. Supreme Court in Quill Corp v North Dakota, 504 US 298; 112 S Ct 1904; 119 L Ed 2d 91 (1992), ("the Due Process/Commerce Clause jurisdictional tests"). The Court of Appeals concluded that under the Due Process/Commerce Clause jurisdictional tests, Gillette was taxable in Michigan for the years 1976 through 1981. The Court of Appeals did not resolve the issue, briefed and argued by the parties, as to whether Gillette would have been protected from SBT taxation had PL 86-272 been the applicable jurisdictional test.

18. The informal conference was held in this matter on April 30, 1993. On December 28, 1994, the Department's hearing referee issued her informal conference recommendation, recommending that the Intent to Assess be finalized against Cosmair, without any penalty, under the Due Process/Commerce Clause jurisdictional tests.

19. The Department's Decision and Order of Determination in this case was issued on April 11, 1995, accepting the recommendation of its hearing referee. On April 19, 1995, the Department, applying the Due Process/Commerce Clause jurisdictional tests, issued Final Assessment No. G014160 for SBT tax in the amount of $227,602.00 and interest of $143,939.67 for a total amount assessed of $371,541.67 ("the Assessment"). The penalty of $113,801.00 was canceled.

20. On July 6, 1995, Cosmair paid the Assessment under protest. Cosmair filed its complaint for refund in the Court of Claims on July 10, 1995. The Department filed its Answer and Affirmative Defenses on July 27, 1995. Cosmair filed its First Amended Complaint on December 14, 1995. The Department filed its Amended Answer on January 14, 1996.

21. After the Court of Appeals' decision in Gillette was handed down, the Department determined that under the Due Process/Commerce Clause jurisdictional tests therein enunciated it could probably assert jurisdiction under the SBT Act against multistate taxpayers which had filed Michigan employee withholding tax returns but were not filing SBT returns, as the presence in Michigan of such an employee was enough to satisfy the Due Process/Commerce Clause jurisdictional tests.

22. In regards to these potential taxpayers who would no longer be protected by PL 86-272 under the Court of Appeals' decision in Gillette, the Department took the following actions: The Department worked through the many thousands of potential SBT taxpayers, which had filed Michigan employee withholding tax returns during the years 1991 to 1993 but had not filed SBT returns, and produced a list of over 2000 potential SBT taxpayers. Commencing in November 1993, after the Court of Appeals' decision, the Department, Audit Division, Discovery Unit, sent out a series of "Notice of Inquiry Concerning Michigan Single Business Tax" ("the Notice(s) of Inquiry") to these over 2000 potential SBT taxpayers. It forwarded, in several different

"batches", Notice(s) of Inquiry, informing such potential SBT taxpayers that the review period was for tax years ending in and after 1989, and that the Department believed because they filed employee withholding returns for years 1991, 1992 and 1993, they were subject to its SBT jurisdiction under the Due Process/Commerce Clause jurisdictional tests, requesting them to voluntarily remit SBT returns and taxes for tax years ending in 1989 and later, with interest, but without penalty.

23. The Notices of Inquiry did not indicate that the Department would not pursue potential taxpayers complying with its terms with respect to earlier years. However, persons who inquired about years before 1989 were advised that the Department would not pursue potential SBT liability for such years under the Due Process/Commerce Clause jurisdictional tests if the activities conducted in Michigan were limited to sales solicitation protected under PL 86-272. If activities conducted in Michigan before 1989 would not have been protected by PL 86-272, there was no assurance given that the Department would not pursue any potential SBT liability.

24. The Department, in forwarding a Notice of Inquiry to the over 2,000 potential SBT taxpayers which it had discovered, made no effort to ascertain, or to ask such potential taxpayers for information as to whether such taxpayers would have been subject to SBT jurisdiction under either the inapplicable PL 86-272 test or the Due Process/Commerce Clause jurisdictional tests for years prior to 1989.

25. The Department did not send a Notice of Inquiry to Cosmair.

26. On April 12, 1995, Mr. Louis Sturniolo sent a letter to Mr. David Kirvan requesting that Cosmair be offered the same arrangement that was being offered to the over 2,000 other potential SBT taxpayers to whom the Department had sent a Notice of Inquiry. The letter informed the Department that Cosmair would be willing to file SBT tax returns and pay SBT taxes for the years

1989 and subsequent. The Department rejected this request.

27. Of the over 2,000 businesses to whom the Department sent its Notice of Inquiry, 727 potential taxpayers responded by filing SBT returns, remitting taxes with interest, with the Department collecting over $27,000,000.

28. Neither the Department's Final Assessment against Cosmair nor its Decision and Order of Determination in this matter was based on, or discussed, jurisdiction being established under the PL 86-272 jurisdictional test found inapplicable in the Gillette case.

29. Cosmair and the Department agree that the documents, pleadings and discovery listed on **Appendix A** attached, be incorporated in, and be deemed to be part of the record in this matter, neither stipulating to the facts asserted in any answer or document prepared by or on behalf of the other, but each stipulating that such documents are authentic, are to be considered a part of the record before this Court in this matter, and are what they purport to be. Each party reserves the right to contest the relevancy, veracity, or materiality of any facts or other assertions contained in the materials included in **Appendix A**.

29. **Appendix A** includes and incorporates herein the following documents:

1. Plaintiff's Complaint, filed on July 10, 1995, with Exhibits A through E attached thereto, as follows;

   Exhibit A - 1) Department of Treasury's Decision and Order of Determination dated April 11, 1995 and 2) Bill for Taxes Due - Final Assessment, Assessment No. G014160, dated April 19, 1995

   Exhibit B - Plaintiff's July 7, 1995 Letter of Protest

   Exhibit C - Department of Treasury's Single Business Tax Bulletin 1980-1 - Jurisdictional Standard and

Revenue Administrative Bulletin 89-46 Jurisdictional Standard, replacing Single Business Tax Bulletin 1980-1

Exhibit D - Plaintiff's letter dated April 12, 1995, offering to accept Moratorium Offer

2. Defendant's Answer and Affirmative Defenses filed on July 27, 1995, with Exhibits 1 and 2 attached thereto, as follows;

Exhibit 1 - Department of Treasury's Single Business Tax Bulletin 1980-1 - Jurisdictional Standard

Exhibit 2 - Department of Treasury's Notice of Inquiry concerning Michigan Single Business Tax

3. Plaintiff's First Amended Complaint, filed on December 14, 1995, with Exhibits A through E attached thereto;

Exhibit A - 1) Department of Treasury's Decision and Order of Determination dated April 11, 1995 and 2) Bill for Taxes Due - Final Assessment, Assessment No. G014160, dated April 19, 1995

Exhibit B - Plaintiff's October 21, 1991 Request for Informal Conference letter

Exhibit C - Plaintiff's July 7, 1995 Letter of Protest

Exhibit D - Department of Treasury's Single Business Tax Bulletin 1980-1 - Jurisdictional Standard and Revenue Administrative Bulletin 89-46 Jurisdictional Standard, replacing Single Business Tax Bulletin 1980-1

Exhibit E - Plaintiff's letter dated April 12, 1995,

offering to accept Pre 1989 Amnesty Offer

4. Defendant's Answer to First Amended Complaint, filed on January 4, 1996, with Exhibit 1 attached thereto as follows;

   Exhibit 1 - Department of Treasury's Single Business Tax Bulletin 1980-1 - Jurisdictional Standard

5. Plaintiff's Interrogatories to Defendant, served on October 6, 1995;

6. Defendant's Response and Objections to Plaintiff's Interrogatories to Defendant, served on November 3, 1995, with Exhibits 1 and 2 attached thereto as follows;

   Exhibit 1 - Department of Treasury's Notice of Inquiry Concerning Michigan Single Business Tax

   Exhibit 2 - Department of Treasury's letter dated July 13, 1995

7. Plaintiff's Second Interrogatories to Defendant, served on December 1, 1995;

8. Defendant's Response and Objections to Plaintiff's Second Interrogatories to Defendant, served on January 9, 1996;

9. Plaintiff's Third Interrogatories to Defendant, served on December 1, 1995;

10. Defendant's Response and Objections to Plaintiff's Third Interrogatories to Defendant, served on January 9, 1996;

11. Plaintiff's First Request for Admissions to Defendant, served on October 18, 1995;

12. Defendant's Response and Objections to Plaintiff's First Request for Admissions to Defendant, served on November 14, 1995;

13. Plaintiff's Second Request for Admissions to Defendant, served on December 1, 1995;

14. Defendant's Response and Objections to Plaintiff's Second Request for Admissions to Defendant, served on December 21, 1995; Defendant's Supplemental Response to Plaintiff's Second Request for Admissions to Defendant, served on July 1, 1996;

15. Defendant's First Interrogatories to Plaintiff, served on October 3, 1995;

16. Plaintiff's Partial Answer to Defendant's First Interrogatories to Plaintiff, served on December 4, 1995, with Exhibit attached thereto as follows;

    Exhibit A - Plaintiff's List of Witnesses

17. Defendant's Revised First Request for Admissions to Plaintiff, served on December 21, 1995, with Exhibits 1 through 7 attached thereto as follows;

    Exhibit 1 - Letter from Mr. Lou Sturniolo to Mr. David Kirvan dated December 6, 1988

    Exhibit 2 - Letter from Mr. Lou Sturniolo to Mr. David Kirvan dated February 2, 1989 and the completed Michigan Business Activity Questionnaire

    Exhibit 3 - Letter from Mr. David Kirvan to Mr. Louis Sturniolo, dated February 16, 1989

    Exhibit 4 - Letter from Mr. Lou Sturniolo to Mr. David Kirvan dated April 19, 1991

Exhibit 5 - Letter from Mr. David Kirvan to Mr. Louis Sturniolo, dated May 29, 1991

Exhibit 6 - Department's Intent to Assess No. G014160 against Plaintiff

Exhibit 7 - Letter from Mr. Louis Sturniolo to Mr. Gary Sandborn, dated October 21, 1991

18. Plaintiff's Response and Objections to Respondent's [Defendant's] First Revised Request for Admissions to Plaintiff, served on January 16, 1996, with Exhibits 1 through 7 attached thereto as follows:

Exhibit 1 - Letter from Mr. Lou Sturniolo to Mr. David Kirvan dated December 6, 1988

Exhibit 2 - Letter from Mr. Lou Sturniolo to Mr. David Kirvan dated February 2, 1989 and the completed Michigan Business Activity Questionnaire

Exhibit 3 - Letter from Mr. David Kirvan to Mr. Louis Sturniolo, dated February 16, 1989

Exhibit 4 - Letter from Mr. Lou Sturniolo to Mr. David Kirvan dated April 19, 1991

Exhibit 5 - Letter from Mr. David Kirvan to Mr. Louis Sturniolo, dated May 29, 1991

Exhibit 6 - Department's Intent to Assess No. G014160 against Plaintiff

Exhibit 7 - Letter from Mr. Louis Sturniolo to Mr. Gary Sandborn, dated October 21, 1991

19. Defendant's Supplemental Response and Objections to Plaintiff's Second Interrogatories to Defendant, served

on July 1, 1996;

20. Defendant's Supplemental Response and Objections to Plaintiff's Third Interrogatories to Defendant, served on July 1, 1996;

21. Defendant's Supplemental Response to Plaintiff's Second Request for Admissions to Defendant, served on July 1, 1996;

22. State of Michigan Department of Treasury Inter Office Memo, Date: March 30, 1993; To: Audit Managers; From: Sue Brokenshire; Subject: SBT-NEXUS in Michigan and other states, attached thereto a copy of Dave Kirvan's instructions to the SBT staff regarding Guardian/Cargill/Gillette;

23. State of Michigan Department of Treasury Inter Office Memo; Date: May 26, 1993; To: Audit Managers; From: Sue Brokenshire; Subject: NEXUS SBT with attached memo from Dave Kirvan;

24. Michigan Department of Treasury Memo; To: Audit Managers; From: Sue Brokenshire; Date: June 29, 1995; Subject: SBT; MACPA State Tax Form Handout; Handout supplied by Dave Kirvan and prepared for the June 22, 1995 State Tax Forum, covering New Legislation, pending Legislation, and Administration;

25. State of Michigan Department of Treasury Inter Office Memo; Date: October 13, 1994; To: Audit Managers; From: Sue Brokenshire; Subject: General Information TAXES, with attached review of Michigan Tax Changes and court cases prepared by the State Bar;

26. Single Business Tax Update, David M. Kirvan, CPA Administrator Single Business Tax Division (Last

updated 1/18/96).

27. Plaintiff's 1984 SBT return;

28. Plaintiff's 1985 SBT return;

29. Plaintiff's 1986 SBT return;

30. Plaintiff's 1987 SBT return;

31. Plaintiff's 1988 SBT return;

32. Business Activity Questionnaire, dated 11/12/86;

33. Letter dated 7/6/95, from Susan Marion to Department of Treasury, with Letter of Protest;

34. Single Business Tax Bulletin 1980-1 - "Jurisdictional Standard";

35. Revenue Administrative Bulletin 89-46 Jurisdictional Standard, replacing Single Business Tax Bulletin 1980-1;

36. Letter dated 12/6/88 from Louis Sturniolo to D. Kirvan;

37. Letter dated 2/2/89 from Louis Sturniolo to D. Kirvan, with attachment;

38. Letter dated 2/16/89 from David Kirvan to Louis Sturniolo;

39. Letter dated 3/29/91 from Louis Sturniolo to David Kirvan;

40. Letter dated 4/19/91 from Louis Sturniolo to David Kirvan;

41. Letter dated 5/29/91 from David Kirvan to Louis Sturniolo;

42. Audit transmittal letter and relevant schedules from SBT audit;

43. Intent to Assess No. G014160, dated 10/8/91;

44. Letter dated 10/21/91 from Louis Sturniolo to Gary Sandborn;

45. Hearing Referee's Informal Conference Recommendation, dated 12/28/94;

46. Decision and Order of Determination, dated 4/11/95; and

47. Final Assessment No. G014160, dated 4/19/95.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
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Dated: July 29, 1996

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Dated: July 23, 1996

APPENDIX J

[SEAL]
William G. Milliken, Governor
Loren E. Monroe, State Treasurer

STATE OF MICHIGAN
DEPARTMENT OF TREASURY
TREASURY BUILDING
LANSING, MICHIGAN 48922

Single Business Tax Bulletin 1980-1

Jurisdictional Standard
May 1, 1980

Sec. 41. "A taxpayer whose business activities are taxable both within and without this state, shall apportion his tax base as provided in this chapter."

Sec. 42 "For purposes of apportionment of the tax base from business activities under this act, a taxpayer is taxable in another state if, (a) in that state he is subject to a business privilege tax, a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business or a corporate stock tax, a tax of the type imposed under this act, or (b) that state has jurisdiction to subject the taxpayer to 1 or more of the taxes regardless of whether, in fact, the state does or does not."

Three court cases have an affect on the jurisdiction position:

Stockler vs. Department of Treasury, 75 Mich App 649 (1977)

Complete Auto Transit, Inc. vs Brady, 430 U.S. 274 (1977)

Association of Washington Stevedoring Companies, 98 S.Ct. 1388 (1978)

Sec. 31(4). "The tax so levied and imposed is upon the privilege of doing business and not upon income."

In Stockler, the court indicated:

> "We do not perceive the SBT as an income tax. Although federal taxable income is used as the starting point in computing the tax base, it is possible that a taxpayer may have no income and still be subject to the payment of the SBT. Other components of the tax base, e.g., wages, include expenses incurred, a theory not synonymous with income taxes."

In Complete Auto and Washington Stevedoring, the court rule a state tax on "privilege of doing business" is not unconstitutional when applied to an interstate activity if:

(1) There is substantial nexus with the taxing state.

(2) The activity within and without the state is fairly apportioned.

(3) Does not discriminate against interstate activity.

(4) It is fairly related to the services provided by the state.

NEXUS

In arriving at sufficient nexus, the Department will use the court cases developed under Public Law 86-272 as a guide.

The fact that a taxpayer is represented in Michigan by an employee exploring the Michigan market and taking orders to be approved

and shipped from outside Michigan will not subject the taxpayer to the SBT. When the employee representing the taxpayer goes beyond the solicitation of sales and provides services for the customer, including but not limited to technical assistance, inventory, stock rotation, or services for the employer, including but not limited to collection of delinquent accounts, warranty work, exchange of damaged merchandise or negotiate settlement of a claim, sufficient nexus is established.

Specifically, the following activities will subject out-of-Michigan persons (including corporations) to the SBT:

(1) A business physically located in Michigan. A physical location includes property owned or rented or an office maintained in a salesperson's home in which the company has a telephone listing in the company name.

(2) The ownership or rental of property used in a business activity.

(3) Services rendered to a purchaser, such as inventories, rotation of stock, building of counter displays, technical assistance in the techniques of using the product.

(4) The ownership of stock on consignment or in public warehouses, a portion of which is committed to the Michigan market.

(5) The authority to accept orders.

(6) The exchange of damaged merchandise or warranty assistance.

(7) Conduct credit checks and/or collect delinquent accounts.

(8) The negotiation of complaints or problem accounts.

(9) Performance of a contract.

(10) Performance of service.

APPORTIONMENT

A Michigan taxpayer using a multi-state market will be subject to the same nexus test for a business activity without Michigan as a taxpayer not domiciled in Michigan is subject to when conducting a business activity within this state, whether or not a return is filed in the foreign state.

When a taxpayer has minimal contact with a state in which the taxpayer is apportioning and by apportioning is avoiding taxation in another, the Department will so advise the foreign state under the provision of Section 103.

> "An officer, agent, or employee of this state or of any department or agency of this state may divulge any information set forth or disclosed in a return or report filed under this act or by an investigation or audit authorized under this act to an office or department of the state government when it is required for the more effective administration or enforcement of the laws of this state, to any proper officer of the United States department of treasury, and to any proper officer of any other state imposing a tax of a substantially similar nature and reciprocating in this privilege. The commissioner may enter into reciprocal agreements with the United States department of treasury, or taxing officials of other states for the enforcement, collection, and exchange of data in connection with the administration of this act."

When nexus in a foreign state is questionable, the Department will require the taxpayer to obtain a written statement from the foreign

state identifying the taxpayer and specific activity conducted which would subject the taxpayer to their jurisdiction.

APPENDIX K

State of Michigan
DEPARTMENT OF TREASURY
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REVENUE ADMINISTRATIVE BULLETIN 1989-46

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SINGLE BUSINESS TAX -
JURISDICTIONAL STANDARD

(Replaces Single Business Tax Bulletin 1980-1)

RAB-89-6. This Bulletin describes the jurisdictional standard to be used in determining whether or not a taxpayer is taxable in another state for purposes of apportionment under Single Business Tax. A taxpayer not subject to tax in another state must allocate the entire tax base to Michigan. [MCL 208.406]

A taxpayer whose business activities are taxable both within and without this State shall apportion his tax base as provided in Chapter 3 (MCL 208.40 through MCL 208.69) of the Single Business Tax Act. [MCL 208.416]

In order to determine nexus in other states, the Single Business Tax Act relies upon MCL 08.42 which states:

> "For purposes of apportionment of the tax base from business activities under this act, a taxpayer is taxable in another state if, (a) in that state he is subject to a business privilege tax, a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business or a corporate stock tax, a tax of the type imposed under this act, or (b) that state has jurisdiction to subject the taxpayer to 1 or more of the taxes

> regardless of whether, in fact, the state does or does not."

Three court cases have an effect on the jurisdiction position:

> Amway v Department of Treasury, __ Mich App __ (1989).
>
> Complete Auto Transit Inc. v Brady, 430 U.S. 274 (1977).
>
> Washington Revenue Department v Stevedoring Association, 435 U.S. 734 (1978).

In Amway, the court indicated:

> "Although Amway did pay a nominal fee when it filed its annual reports in Kentucky . . . Amway did not have employees in Kentucky or own or rent property in that state. Although Amway apparently did solicit orders and make sales in Kentucky through independent contractors, and is registered to do business in Kentucky, these do not constitute a sufficient nexus to allow Kentucky to tax Amway [15 U.S.C. 381(a)(c)] . . . . Thus, Amway's Kentucky sales are considered Michigan sales . . . ."

In Complete Auto and Stevedoring Association the United States Supreme Court ruled a state tax on the "privilege of doing business" is not unconstitutional when applied to an interstate activity if:

1. There is substantial nexus with the taxing state, and

2. The activity within and without the state is fairly apportioned, and

3. The tax does not discriminate against interstate activity, and

4. It is fairly related to the services provided by the state.

Nexus

A taxpayer incorporated in the State of Michigan has nexus in Michigan and is therefore subject to Single Business Tax.

In determining whether a taxpayer has sufficient nexus with Michigan, the Department will use the court cases developed under Public Law 86-272 as a guide when the business activity involves sales of tangible personal property. The definition of tangible personal property for this purpose will be determined under each state's respective laws.

The fact that a taxpayer is represented in Michigan by an employee exploring the Michigan market and taking orders to be approved and shipped from outside Michigan will not subject the taxpayer to the SBT. However, when the employee's activity goes beyond the solicitation of sales by providing services for the customer (including but not limited to technical assistance, inventory, or stock rotation) or services for the employer (including but not limited to collection of delinquent accounts, warranty work, exchange of damaged merchandise or negotiate settlement of a claim), there is sufficient nexus with Michigan to subject an out-of-state employer to single business tax. (See exception below for that activity conducted by independent contractors).

Immunity

On the sale of tangible personal property is afforded immunity under Public Law 86-272. Therefore, the leasing, renting, licensing or other disposition of tangible personal property is not afforded any such immunity from taxation. In addition, the selling or providing of services, and the selling, leasing, renting, licensing or other disposition of real estate or intangible property are not governed by the nexus standards of Public Laws 86-272. The definition of tangible personal property for this purpose is that to be found under each state's respective laws.

Non-immune Activities. The following in-state activities will cause otherwise immune sales to lose their immunity:

1. Making repairs or providing maintenance.
2. Collecting delinquent accounts.
3. Investigating credit worthiness
4. Installation or supervision of installation.
5. Conducting training courses, seminars or lectures.
6. Providing engineering functions.
7. Handling customer complaints.
8. Approving or accepting orders.
9. Repossessing property.
10. Securing deposits on sales.
11. Picking up or replacing damaged or returned property.
12. Hiring, training, or supervising personnel.
13. Providing shipping information and coordinating deliveries.
14. Maintaining sample or display room in excess of two weeks (14 days) during the tax year.
15. Carrying samples for sale, exchange or distribution in any manner for consideration or other value.
16. Owning, leasing, maintaining or otherwise using any of the following facilities or property in state:

A. Repair shop
B. Parts department
C. Purchasing office
D. Employment office
E. Warehouse
F. Meeting place for directors, officers, or employees
G. Stock of goods
H. Telephone answering service
I. Mobile stores (i.e., trucks with driver salespersons)
J. Real property of fixtures of any kind.

17. Consigning tangible personal property to any person, including an independent contractor.

18. Maintaining, by either an in-state or an out-of-state resident employee, an office or place of business (in-home or otherwise).

19. Conducting any activity in addition to those described under Immune Activities below is not an integral part of the solicitation of orders.

Immune Activities. The following in-state activities will not cause the loss of immunity for otherwise immune sales:

1. Advertising campaigns incidental to missionary activities.
2. Carrying product samples for display only or for distribution without charge or other consideration.
3. Owning or furnishing autos to salespersons.
4. Passing customer inquiries and complaints on to the home office.
5. Incidental and minor advertising (i.e., notice in newspaper that a salesperson will be in town at a certain time).
6. Missionary sales activities.
7. Checking of customers' inventories for reorder, but not for other purposes.
8. Maintaining a sample or display room for two weeks (14 days) or less during the tax year.
9. Soliciting sales by an in-state resident employee of the taxpayer, provided the employee maintains no in-state sales office or place of business (in-home or otherwise).

Public Law 86-272 provides immunity to certain in-state activities if conducted by an independent contractor that would not be afforded if performed by the taxpayer directly. Independent

contractors may engage in the following limited activities in the State without subjecting outstate taxpayer to single business tax:

1. Soliciting sales
2. Making sales
3. Maintaining a sales office.

Sales representatives who represent a single principal are not considered to be independent contractors and are subject to the same limitations as employees.

Maintenance of a stock of goods in the State by the independent contractor, under consignment or any other type of arrangement with the principal, shall remove the tax immunity.

Apportionment

A Michigan taxpayer using a multi-state market will be subject to the same nexus test for a business activity without Michigan as a taxpayer not domiciled in Michigan whether or not a return is filed in the foreign state. When a taxpayer has minimal contact with a state and the taxpayer is apportioning to that state, and by such apportioning the tax base the taxpayer is avoiding taxation in another state, the Department will so advise the foreign state under the provisions of MCL 208.103:

> "An officer, agent, or employee of this state or of any department or agency of this state may divulge any information set forth or disclosed in a return or report filed under this act or by an investigation or audit authorized under this act to an office or department of the state government when it is required for the more effective administration or enforcement of the laws of this state, to any proper officer of the United States department of treasury, and to any proper officer of any other state imposing a tax of a substantially similar nature and reciprocating in

> this privilege. The commissioner may enter into reciprocal agreements with the United States department of treasury, or taxing officials of other states for the enforcement, collection, and exchange of data in connection with the administration of this act."

When nexus in a foreign state is questionable, the Department will require the taxpayer to file an "Affidavit of Taxability" providing specific information and describing the activity subjecting the taxpayer to the foreign state's tax jurisdiction.